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No. 96 96 373 SEP 9 1996

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LYNDA BROOKS; VERNA HOBSON; GERALDINE BAVARO; HARRIET EATON; JANE DOE and RICHARD ROE, as parents and guardians of, respectively, MICHAEL BROOKS; THERESA HOBSON; LISA BAVARO; EMILY EATON; JOHN DOE, and RACHEL ROE,

Petitioners,

—against—

GEORGE E. PATAKI, as Governor of the State of New York; THOMAS A. MAUL; JOEL A. DVOSKIN, and JAMES L. STONE as, respectively, Commissioners of the New York State Office of Mental Retardation and Developmental Disabilities; Office of Mental Health, and Department of Social Services,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Do petitioners, who are severely developmentally disabled or mentally ill young adults placed as children by New York State in out-of-state institutions, meet the "deprivation of liberty" standard of *DeShaney* v. *Winnebago County Department of Social Services*, 489 US 189, 200, 201 n. 9 (1989), thereby coming within the protection of due process?

2. Does New York State's cutoff of funding for its severely disabled citizens placed in out-of-state institutions violate equal protection when New York chooses to continue funding for similarly disabled citizens placed in-state?

List of Parties

1. As in caption. Pursuant to this Court's Rule 12.6, the Clerk has been concurrently notified that Mayor Giuliani, Commissioner Hammons, and the City of New York (collectively, the "New York City defendants"), in our opinion, have no interest in the outcome of this petition.

2. There are no parent companies and no nonwholly owned subsidiaries.

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1. *This petition*: 84 F. 3d 1454 (2 Cir.; May 31, 1996).

   908 F. Supp. 1142 (EDNY; Nov. 16, 1995).

2. *This case*: No. 95-9178 (2 Cir.; Dec. 19, 1995; stay denied).

   No. 95-9178 (2 Cir.; Aug. 7, 1996; rehearing denied).

   No. 95-9178 (2 Cir.; Aug. 29, 1996; mandate stayed).

   908 F. Supp. 1157 (EDNY; Nov. 30, 1995; stay denied).

3. *Related cases*:

(a) *Suffolk Parents of Handicapped Adults* v. *Pataki*:

(i) 921 F. Supp. 970 (EDNY; Apr. 2, 1996; injunction granted); *appeal argued* (2 Cir.; June 24, 1996).

(ii) 924 F. Supp. 431 (EDNY; Apr. 24, 1996; stay to county denied in part); *r'vd.*, __ F. 3d __ (2 Cir.; May 14, 1996; stay to county granted);

(iii) __ F. Supp. __, 1996 WL 285423 (EDNY; May 17, 1996; payment by state directed).

(b) *Westchester Advocates for Disabled Adults* v. *Pataki*, F. Supp. __, 1996 WL 363139 (EDNY; June 17, 1996; injunction granted but stayed as to county); now on appeal.

(c) *New York Council for Exceptional People* v. *Pataki*, No. 102684/95 (Sup. NY):

(i) on Article 78 proceeding, unreported order (April 10, 1995); unappealed.

(ii) on declaratory judgment, unreported order (June 13, 1995); *aff'd.*, __ AD 2d __, 632 NYS 2d 531 (1 Dept.; Oct. 5, 1995); *lv. denied*, __ AD 2d __, __ NYS 2d __ (1 Dept.; Nov. 16, 1995), and __ NY 2d __ (Feb. 20, 1996).

Jurisdictional Basis

The order of the Court of Appeals sought to be reviewed was entered 31 May 1996. (1-39a.) A petition for rehearing under FRAP 40(a) was duly filed on 13 June 1996. The Court of Appeals denied the petition on 7 August 1996 and stayed its mandate on 29 August 1996. (70-74a.) The basis of this Court's subject matter jurisdiction is 28 USC § 1254(1).

Statutes Involved

US Constitution, Amendment XIV, § 1:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The TCF Statute (NY Social Services Law, § 466):

> "(2) Social services districts may expend funds to provide transitional care as described in this section. Approved expenditures for transitional care by social services districts . . . shall be subject to state reimbursement at the rate of [60%] for periods on or after January [1, 1995].
>
> * * *
>
> (6) On and after January [1, 1999], all expenditures related to transitional care for persons remaining in such care at that time shall become the sole responsibility of either [OMRDD] or [OMH], whichever has accepted responsibility for the adult placement or services."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-____

LYNDA BROOKS; VERNA HOBSON; GERALDINE BAVARO; HARRIET EATON; JANE DOE and RICHARD ROE, as parents and guardians of, respectively, MICHAEL BROOKS; THERESA HOBSON; LISA BAVARO; EMILY EATON; JOHN DOE, and RACHEL ROE,

Petitioners,

—against—

GEORGE E. PATAKI, as Governor of the State of New York; THOMAS A. MAUL; JOEL A. DVOSKIN, and JAMES L. STONE as, respectively, Commissioners of the New York State Office of Mental Retardation and Developmental Disabilities; Office of Mental Health, and Department of Social Services,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

1. The Facts

a. Summary

Petitioners[1] are severely retarded young adults, involuntarily institutionalized by New York State as children with a special education placement. All were institutionalized in neighboring states.[2] Required to stay in the same institutions when they reached adulthood, all remain utterly incapable of making their own decisions for residence, care and treatment. (4a; 32a; 40-41a.)

Most petitioners have been severely disabled from birth. Other disabilities arose in childhood. Petitioners' common interest in this litigation is state action dealing with their condition, including initial placement; continuing funding; funding cutoffs, and attempted transfers.

New York State has stopped funding petitioners' care in order to force them to leave the institutions in which they have spent most of their lives. The sole reason for the cutoff is the out-of-state location of the institutions.

It is undisputed that:

(a) As children, petitioners were placed out-of-state for special education by New York, because their disabilities were too severe for New York State treatment capabilities;

(b) New York funded the same placement after the children "aged out" of the educational placement when each became 21;

---

[1] This is an action commenced in Brooklyn federal court under the civil rights laws, 42 USC § 1983, in the name of the disabled individuals ("Petitioners"), by their parents or guardians. Violations of due process and equal protection are claimed.

[2] Pennsylvania, New Jersey, and Rhode Island.

(c) There are still no in-state facilities. (4a; 15a.)

The Court of Appeals panel majority put it perfectly:

> "Given plaintiffs' undisputed contention that 'there is no appropriate place in New York available for them' . . . " (4a.)

Upon these facts, petitioners submit that they are involuntarily institutionalized, and thereby within the due process protection recognized by *DeShaney* v. *Winnebago County Department of Social Services*, 489 US 189 (1989):

> "Had the State, *by the affirmative exercise of its power*, removed Joshua from free society, and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration *or institutionalization* to give rise to an affirmative duty to protect." (489 US at 201, n. 9; emphasis added.)

Petitioners also submit that an equal protection violation is made out. We now provide a brief factual synopsis of New York's funding of the care of these Petitioners.

b. State placements of children

New York State has assumed responsibility for disabled children within its special educational process. The same result follows whether the disabled child is placed within New York State or outside of it. NY Educational Law, §§ 4401 ff. In all cases, the State makes the placement. New out-of-state placements under the special education statute continue today.

c. State funding for new adults

New York State continued to assume responsibility for these disabled children past their twenty-first birthday. In a program called "transitional care funding" ("TCF"), New York ratified and continued its initial placement because there

remained no in-state facility appropriate for petitioners. This process also included new out-of-state placements. In 1994, the TCF program was codified at § 466 of the New York Social Services Law (the "TCF Statute", or "SSL 466", as appropriate).

Having "aged out" of an educational placement, petitioners were required to stay at the same out-of-state institution under the TCF program. Only the source of funding changed.

It is undisputed that the TCF program contained no capital construction funds to create new in-state facilities appropriate for petitioners' severe disabilities.

d. County withdrawal and state funding cutoff

New York State chose to share its TCF program responsibility with its 62 counties. The five counties which constitute New York City withdrew from the program in November, 1994, effective June 1, 1995. New York State took the position that the TCF program ended as to any disabled individual referred from that county who had been placed out-of-state.[3] Effective with the June, 1995 payment, New York State stopped paying for petitioners' care.

From an equal protection perspective, the TCF program is quite noteworthy. It applied whenever the disabled child turned 21, whether her placement was in-state or out-of-state. However, in 1995, the State chose to treat those disabled individuals previously placed out-of-state differently, denying them funding if in-state transfers were refused. For those TCF recipients who had been initially placed as children within New York State, government funding continued despite county withdrawal. Only the budget line changed.

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[3] All petitioners were referred from counties within New York City, which is a single "social services district" under the TCF Statute. See SSL 61(1).

e. State court statutory construction

Upon notice of the City's withdrawal, a group of parents of New York City referrals sued in state court for a construction of the TCF Statute. They sought a declaration of, *inter alia*, the State's duty to fund the program share of any withdrawing county.

Two weeks after the effective date of the City's withdrawal, a trial-level court issued a declaratory judgment interpreting SSL 466. It sustained the State's position that its payment was contingent upon county participation. The sole issue presented was the construction of the newly-enacted TCF Statute. *New York Council for Exceptional People* v. *Pataki*, No. 102684/95 (Sup. Ct., NY Co., June 13, 1995; unreported).[4]

f. Ripening of constitutional claims

Because the TCF Statute was newly enacted, petitioners felt obliged to give the state court an opportunity to make a statutory construction in line with the obvious intent of the program.[5] When the opposite construction was given, petitioners' constitutional claims ripened. Funding was now denied by state judicial action, authoritatively construing the applicable state statute in a manner violative of petitioners' constitutional rights.

Upon this record, petitioners invoked the aid of the federal courts on July 20, 1995.

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[4] The trial court's view was subsequently affirmed. *New York Council*, *supra*, __ AD 2d __, 632 NYS 2d 531 (1 Dept.; Oct. 5, 1995). Leave to appeal to the New York Court of Appeals was denied in unreported orders by both the Appellate Division of the New York Supreme Court (Nov.16, 1995) and the Court of Appeals (Feb. 20, 1996).

[5] See *Railroad Commission of Texas* v. *Pullman Co.*, 312 US 496 (1941).

2. Proceedings Below

a. *District Court*

Plaintiffs alleged, *inter alia*, that the funding cutoff and proposed transfer procedures constituted violations of due process and equal protection. Acts post-dating the funding cutoff were asserted as evidence of continuing state action and control.[6]

After a hearing, the United States District Court for the Eastern District of New York granted a preliminary injunction directing the resumption of state payments "to maintain plaintiffs in their present placement" while relocation was examined. (19a.) Hearing requirements were also imposed. The District Court concluded:

> "[T]he State has been intimately involved in their institutionalization, from the time it gave its approval when plaintiffs were children, and has provided subsidies for their original placements in out-of-state residential care ever since." (53a.)

Because petitioners were "profoundly disabled and medically fragile", suffering from "multiple handicaps" (40a, 41a), the District Court found that "by any test, [they] are least able to fend for themselves" (68a). Under these circumstances, the choice of institutionalization here "must be deemed in law to be that of the government". (53a; citation omitted.) Accordingly, the Court held, petitioners were entitled to due process under *Youngberg* v. *Romeo*, 457 US 307 (1982), as applicable to "persons confined (for non-penal reasons) in an institution as the result of state action". (55a).[7]

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[6] They include continuing placement efforts as well as an attempted involuntary transfer during the July 4, 1995 weekend. (See 13-14a.)

[7] Justice Blackmun's concurring opinion in *Youngberg* was adopted as the law within the Second Circuit in *Society for Good Will to Retarded Children, Inc.* v. *Cuomo*, 737 F. 2d 1239, 1246 (2 Cir. 1984).

This holding effectively placed petitioners outside the limiting range of *DeShaney*, *supra*, and within the language of its footnote 9: an "affirmative exercise of [state] power" which "placed" petitioners in an "institution". (489 US at 201, n. 9; 37a.) In a later related case, the District Court so held directly. *Suffolk Parents of Handicapped Children* v. *Pataki*, 921 F. Supp. 970 (EDNY; Apr. 2, 1996); *appeal argued*, June 24, 1996.

The New York State defendants appealed only the payment portion of the injunction. The New York City defendants did not appeal.[8]

b. Court of Appeals

On May 31, 1996, by divided vote, the Court of Appeals for the Second Circuit decided this action, involving the New York City referrals alone.[9] Vacating the entire injunction, the panel majority held:

> "[U]nder *DeShaney*, plaintiffs have no independent due process right to funded care from the State defendants." (31a.)

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[8] Meanwhile, two other counties chose to withdraw from the TCF program on one month's notice. Related civil rights actions were commenced, and this injunction was duly applied to all parties therein. *Suffolk Parents of Handicapped Adults* v. *Pataki*, 921 F. Supp. 970 (EDNY; Apr. 2, 1996); later opinions, 924 F. Supp. 421 (EDNY; Apr. 24, 1996) and __ F. Supp. __, 1996 WL 285423 (EDNY; May 14, 1996), and *Westchester Advocates for Disabled Adults* v. *Pataki*, __ F. Supp. __, 1996 WL 363139 (EDNY; June 17, 1996) (equal protection basis for injunction).

[9] *Suffolk Parents* was argued at the Court of Appeals on June 24, 1996, and is *sub judice*. In *Westchester Advocates*, the appeals are now being perfected. Consolidation of appeals then pending was denied by the Court of Appeals on May 14, 1996.

The panel majority referred to, but did not determine, petitioners' equal protection argument.[10] (17a.) *Res judicata*, based on the prior declaratory judgment action, was initially stated to be a barrier (21-25a; *cf.* 35a), but was then set aside by the panel majority, with the full concurrence of the dissent. (25-26a and n. 12; 35a.) The dissent found due process violations, concluding that *DeShaney*, *supra*, was inapplicable to the case of the involuntarily committed incompetent. (35-38a.)

By petition for rehearing, petitioners asked the panel majority to determine the equal protection issue and to limit its holding to funding issues. By suggestion for rehearing *in banc*, petitioners sought to alert the full Court of Appeals to the sweep of the panel majority's due process holding. The petition was denied on August 7, 1996, exhausting the options below. (70-71a.) A stay of mandate under FRAP 41(b) was granted on August 29, 1996 to permit the filing of this petition. (72a.)

Summary of Argument

Half of the four federal judges considering the question below concluded that *DeShaney* does not preclude petitioners' due process rights herein. Review to determine the scope of *DeShaney* is appropriate. (Point I, below.)

An injunction granted in part on significant equal protection grounds was vacated without reference to these arguments. On the merits, we submit denial of equal protection is apparent, and review is warranted because of the importance of the deprivation. In the alternative, we seek vacatur and remand for decision on equal protection grounds. (Point II, below.)

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[10] In *Suffolk Parents*, with two of the three *Brooks* judges sitting on the panel, supplemental briefing of equal protection issues was ordered at the June 24, 1996 argument. Briefs were filed on July 1, 1996. We await the decision of the *Suffolk Parents* panel.

ARGUMENT

I. *DE SHANEY* DOES NOT DEPRIVE DUE PROCESS TO THOSE INVOLUNTARILY INSTITUTIONALIZED BY STATE ACTION.

Petitioners' position breaks no new constitutional ground. Generally, a protected interest may not be removed (by lack of funding, or otherwise) without due process. See, *e.g.*, *Paul* v. *Davis*, 424 US 693, 710-1 (1976), and *Vitek* v. *Jones*, 445 US 480, 489, 490 n. 6 (1980). This general principle was applied to the handicapped and retarded in state-directed custody in *Youngberg* v. *Romeo*, *supra*, 457 US at 317.

A limitation was placed on *Youngberg* by *DeShaney*, *supra*, although *Youngberg* was expressly not overruled. (489 US at 198-200.) The issue involved here is whether the facts of this case fit within this language in *DeShaney*:

> "In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—*through incarceration, institutionalization, or other similar restraint of personal liberty*—which is the 'deprivation of liberty' triggering the protections of the Due Process Clause. . .". (489 US at 200; emphasis added.)

The consequence is clear. If there is no state deprivation of liberty, no due process obligation is owed even upon actual knowledge of impending abuse. (See 27-29a.) If the state restrains liberty, then due process rights attach and are governed by *Youngberg*, *supra* and *Good Will*, *supra*. The District Court based its injunction on *Youngberg*-protected rights, an analysis which Judge Parker endorsed in his dissent at the Court of Appeals. (36-37a; 55-57a.)

All judges below agreed that there was state action in connection with the institutionalization of each petitioner. The

panel majority concluded, "We accept the idea of state action in this case *arguendo*", upon the following evidence:

> "[T]he State approved out-of-state placements, monitored out-of-state facilities, and in essence is deemed to have caused the out-of-state placement by its failure to find a satisfactory in-state placement." (26-27a, n. 13.)

It is undisputed that petitioners' severe disabilities compel their institutionalization. As Justice Blackmun sensitively noted in *Youngberg*, *supra*:

> "For many mentally retarded people, the difference between the capacity to do things for themselves within an institution, and total dependence on the institution for all of their needs, is as much liberty as they ever will know." (457 US at 327.)

DeShaney did not purport to limit *Youngberg* in the areas presented by this petition. The facts of *DeShaney* did not rise to levels requiring *Youngberg-Good Will* protection, because Joshua DeShaney was not institutionalized. *DeShaney* expressly noted:

> "Had the State, by the affirmative exercise of its power, removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect." (489 US at 201, n. 9.)
>
> * * *
>
> "Of course, the protections of the Due Process Clause, both substantive and procedural, may be triggered when the State, by the affirmative acts of its agents, subjects an involuntarily confined individual to deprivations of liberty which are not among those generally authorized by his confinement." (489 US at 200, n. 8.)

On these facts, petitioners submit that *DeShaney* would conclude that their liberty interest was restrained by state action, and that *Youngberg-Good Will* protection thereby attached, justifying the injunction. The duty to protect in *DeShaney* would become a duty to pay here: a duty to continue the *status quo* enjoyed by each TCF Beneficiary since childhood, as the Court of Appeals dissent and the District Court concluded. (39a.)

II. THE FUNDING CUTOFF DENIES EQUAL PROTECTION TO THOSE PLACED OUTSIDE NEW YORK.

The Court of Appeals did not address the issue of whether defendant's implementation of the TCF Statute violated the Equal Protection Clause. The District Court decision raised this issue, but did not discuss it because it ruled that the Due Process Clause violations were sufficient to satisfy the standard for a preliminary injunction. (62-63a.) In a later related action, the District Court decided the issue, holding that a violation of equal protection had been made out. *Westchester Advocates for Disabled Adults* v. *Pataki*, __ F. Supp. __, 1996 WL 363139 (EDNY; June 17, 1996).

The TCF Statute distributes benefits unequally, making it subject to scrutiny under the Equal Protection Clause. *Zobel* v. *Williams*, 457 US 55, 60, 67 (1982). State legislation carries a presumption of validity if the statutory classification is "rationally related to a legitimate state interest." *City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 US 432, 440 (1985). However, applying the rational basis standard is not a judicial rubber stamp of state legislation.

The TCF Statute treats plaintiffs unequally by dividing severely disabled adult New York State citizens into two discrete groups which are given radically disparate treatment. Plaintiffs whose out-of-state services were funded under the TCF Statute had their funding terminated without any due

process rights. All other disabled adult New York State residents who receive services in New York State facilities operated and/or certified by defendants have due process protection before funding is discontinued. This "all other" grouping includes those funded under the TCF Statute but placed within New York State.

This disparate treatment of plaintiffs is even more egregious because it results solely from defendants' conduct. New York took similarly situated state residents and converted them into dissimilar situations by placing some in-state and some out-of-state. It then used this distinction as the basis and justification for its classifications and disparate treatment. As the District Court noted in its decision, "this . . . is the very essence of arbitrary state action". (62a, quoting from *Logan* v. *Zimmerman Brush Co.* 455 US 422, 442.)

There is no legitimate state purpose for this distinction. The legislative findings accompanying the TCF Statute speak of issues not involved here, such as "least restrictive environment" and commingling of adults and children. McKinney's Session Laws of New York, L. 1994, c. 600, § 1; codified following SSL 466. The only pertinent portion reads:

> "[Y]ounger adults who aged out of [educational] placements . . . should be *transitioned* to appropriate adult placements and services at the appropriate time. . .". (*Ibid.*; emphasis added.)[11]

Transition, not abrupt cutoffs, is the declared state goal. It was not followed here. The statutory objective might have been served by: (1) providing out-of-state funding for individuals until an appropriate available in-state placement was offered to them, and (2) providing minimal due process protection to continue their funding should there be an objection

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[11] As all petitioners are now in appropriate adult care facilities, it is unclear how the quoted language justifies New York's efforts to transfer these petitioners into the state.

to the proposed in-state placement. However, when funding is stopped and no appropriate in-state placement is offered, the objective of the statute is clearly frustrated.

There can be no legitimate state purpose served in leaving a group of profoundly disabled New York State citizens stranded in an out-of-state facility, at severe risk of being discharged to the street, with no provision for any offer of any available appropriate placement. This is a classic example of a withdrawal:

> "from [one group] but no others, specific legal protection. . . . [I]t imposes a special disability upon those persons alone." *Romer* v. *Evans*, __ US __, 116 S. Ct. 1620, 134 L. Ed. 2d 855, 863, 865 (May 20, 1996).

Conclusion

For the reasons set forth above, this Court should issue a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
September 5, 1996

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1421—August Term 1995

(Argued: January 23, 1996 Decided: May 31, 1996)

Docket No. 95-9178

LYNDA BROOKS; VERNA HOBSON; GERALDINE BAVARO; HARRIET EATON; JANE DOE; AND RICHARD DOE, as parents and guardians of, respectively, Michael Brooks; Theresa Hobson; Lisa Bavaro; Jill Eaton; John Doe; and Rachel Roe,

Plaintiffs-Appellees,

—v.—

RUDOLPH W. GIULIANI, as Mayor of the City of New York; MARVA LIVINGSTON HAMMONS, as Commissioner of the New York City Human Resources Administration, Child Welfare Administration and NEW YORK CITY,

Defendants,

GEORGE E. PATAKI, as Governor of the State of New York; THOMAS A. MAUL, as Commissioner of the New York State Office of Mental Retardation and Developmental Disabilities; JAMES L. STONE, as Commissioner of the New York State Office of

Mental Health and BRIAN J. WING, as acting Commissioner of the New York State Department of Social Services,

Defendants-Appellants.

Before:

WINTER, JACOBS, and PARKER,

Circuit Judges.

Appeal by defendant State officials from a preliminary injunction issued by the United States District Court for the Eastern District of New York (Trager, *J.*) directing them to maintain funding for the care of plaintiffs, who are mentally disabled young adults, pending an orderly transition to a permanent placement.

Vacated and remanded.

Judge Parker dissents in a separate opinion.

AMY L. ABRAMOWITZ, Assistant Attorney General, New York, NY (Dennis C. Vacco, Attorney General of the State of New York; Barbara G. Billet, Deputy Solicitor General; Thomas D. Hughes, Assistant Solicitor General, New York, NY, of counsel), *for Defendants-Appellants.*

WILLIAM J. BURKE, Burke & Stone, New York, NY (Lisa K. Friedman, New York, NY; Robert M. Freedman, Freedman and Fish, New York, NY, of counsel) *for Plaintiffs-Appellees*.

(Michael Prieto, New York, NY), for Susan Shafran-Torres, Edward W. and Ethel B. Chapin, Myron and Lorraine Slaff, Marie Washington, Corine Watson, Carlos Casoria, Marian Nurenberg, Helen Thurman, Mary Dowling, and Roger Leveille, as parents and guardians of, respectively, David Torres, Bruce Chapin, Mathew Slaff, Jacque Washington, Sean Watson, Janine Casoria, Elly Nurenberg, Ernie Thurman, Antonio Staton, and Loudy Leveille, *amici curiae*.

(Thomas E. Coval, Clover & Coval, Willow Grove, PA), for Woods Services, as *amicus curiae*.

JACOBS, *Circuit Judge*:

The United States District Court for the Eastern District of New York (Trager, *J.*) entered a preliminary injunction requiring, *inter alia*, that New York state agencies pay for certain of its severely disabled citizens (plaintiffs here) to live in out-of-state institutions until such time as the State, employing "evaluation procedures evincing the exercise of professional judgment," achieves the "orderly transition" of these individuals "to permanent State approved placement" within

New York. *Brooks v. Pataki*, 908 F. Supp. 1142, 1156 (E.D.N.Y. 1995). Given plaintiffs' undisputed contention that "[t]here is no appropriate place in New York available for them," the effect of this injunction is to maintain funding indefinitely for care at the out-of-state institutions.

The same plaintiffs commenced a prior litigation in the New York state courts, unsuccessfully seeking an order that would require the State to pay the same care expenses sought here. That suit was based upon constitutional and statutory arguments as well as an agreement between city and state agencies. The New York court ruled that the State has no funding obligation.

In this subsequent federal action, plaintiffs seek essentially the same relief from the State on federal constitutional grounds. In this expedited appeal, we conclude that the district court erred in issuing the injunction, because several of plaintiffs' claims are barred by *res judicata*, and the remaining claims do not warrant the injunctive relief as ordered.

BACKGROUND

The eighteen plaintiffs are severely disabled individuals with multiple handicaps who are represented by their parents and guardians. All of the plaintiffs were originally placed as children in out-of-state residential care facilities by the educational and social service agencies of the City of New York, with State approval, because educational placements adequate to their needs were unavailable in-state. The plaintiffs, all of whom are apparently over 21, have now outgrown the educational programs that originally placed them in out-of-state facilities.

When these individuals reached age 21, federal and state education funds by law could no longer be tapped to provide for them. New York City nevertheless continued to pay for residential care at the out-of-state institutions upon determining that suitable adult placements were unavailable in-state. This City-funded care in out-of-state institutions is known as "transitional care," presumably because it was designed to last only until suitable in-state placements could be found. Other counties and localities, for reasons similar to those of New York City, had made comparable out-of-state placements and provided funding for these placements after the affected individuals turned 21. Beginning in 1982, the State reimbursed 50% of the localities' expenditures for these "aged out" individuals by way of an earmarked appropriation within its Aid to Localities Budget. This State budget arrangement, and the reimbursements it afforded, continued until the end of 1994, when the system was modified by legislation. These payments from the State are commonly known as Transitional Care Funding ("TCF"). The State's TCF program in the years 1982-1994 had no legislative authority other than the provision made in the Aid to Localities Budget.

A. The TCF Statute.

In 1994, New York State enacted a statute, effective January 1, 1995, that undertook to place these arrangements on a different footing (the "TCF Statute"). 1994 N.Y. Laws 600; *id.* § 17 (effective date). Section 3 of the TCF Statute, codified at N.Y. Soc. Serv. L. §§ 466 to 466-b (McKinney Supp. 1996), provides for an increase from 50% to 60% in the State's TCF reimbursements to localities in respect of the out-of-state placements; the eventual phase-out of the out-of-state placements; and

the State's assumption by 1999 of 100% funding for individuals still left in out-of-state placements.[1] N.Y. Soc. Serv. L. § 466(2), (5), (6). To effect the transition from out-of-state to in-state placements, the statute directs the New York State Office for Mental Retardation and Developmental Disabilities (the "OMRDD") and the New York State Office of Mental Hygiene (the "OMH") to arrange transfers to appropriate in-state adult care facilities, and establishes a system of administrative hearings for challenges that guardians may make concerning the appropriateness of proposed transfers.[2]

As to each individual, TCF payments would end after an appropriate available in-state adult placement is offered and is either (i) accepted, or (ii) rejected by a guardian but thereafter found to be appropriate in an administrative hearing. Before an in-state placement is found, the TCF Statute provides that counties and localities "*may* expend funds to provide transitional care," which "shall be subject to state reimbursement" at the rate of 60%. *Id.* § 466(2) (emphasis added). On or after January 1, 1999, "all expenditures related to transitional care for persons remaining in such care at that time shall become the sole responsibility of" the OMRDD or the OMH, as the case may be. *Id.* § 466(6). Under this mech-

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[1] Legislative history summarized by the district court identifies a number of purposes for the elimination of the out-of-state placements: to assure State monitoring of the residential facilities; to increase the opportunity for clients to maintain their ties with their families and their communities; and to end the State's dependency on out-of-state facilities that may lack the authority or capacity to care for New York's citizens. 908 F. Supp. at 1144-45. The legislative history also notes the increase in reimbursement costs from $350,000 in 1982 to "a projected $26 million in the 1993-94 State fiscal year." *Id.* at 1144.

[2] Although the City has paid for transitional care, each plaintiff is also a client (for some purposes) either of the state's OMRDD or OMH, depending apparently on the nature of each plaintiff's impairments.

anism, the State agencies pay 100% of the *in-state* residential costs (as they did before the enactment of the TCF Statute); reimburse localities for 60% of the *out-of-state* residential costs until 1999; and pay for 100% of the out-of-state placements remaining in 1999.

Section 16 of the TCF Statute categorically disclaims any entitlement:

> No provision of this act shall be deemed or construed to create any right, interest, or entitlement for any individual to receive mental hygiene, education or social services funds or services, or placement in a mental hygiene facility, or any other right, interest or entitlement to services, funds or placement.

1994 N.Y. 600 § 16 (codified as a statutory note following N.Y. Soc. Serv. L. § 466).

B. The Funding Crisis.

Judge Trager accurately characterizes the controversy giving rise to this lawsuit as "an unfortunate funding dispute between the City and the State of New York."[3] 908 F. Supp. at 1143. In October 1994, New York City notified the State that it would stop paying for out-of-state care after December 31, 1994, a step that would thereby release the State from any reimbursement obligation under the TCF Statute. On December 7, 1994,

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[3] The funding and reimbursement arrangements for these out-of-state placements have long been a flash point between New York City and the State government. In 1985, the City sued the OMRDD in the Supreme Court of New York County for failure to provide adequately for mentally retarded and developmentally disabled persons referred by the City. *City of New York v. Webb*, No. 40313/86 (N.Y. Sup. Ct. N.Y. County). The suit ended in a settlement embodied in a court-ordered stipulation in 1991, in which OMRDD undertook the speedy placement of such persons.

according to plaintiffs' amended complaint, the City's Human Resources Administration (the "HRA") wrote to guardians and the out-of-state residential institutions to advise them of the City's termination of transitional care.[4] The City told the guardians that the HRA's Child Welfare Administration "will assist [the OMRDD] in facilitating the transfer of all young adults out of Transitional Funding. . . . Please be assured that New York City looks forward to working with you in planning for a smooth transition for your family member." One day before the scheduled funding cut-off, on December 30, 1994, the City partially relented and agreed to provide funds until the earlier of June 30, 1995, or such date as the City's budgetary allocation of $1.116 million was exhausted earlier. This undertaking was recorded in a Memorandum of Understanding, dated January 31, 1995, between the HRA and the OMRDD.

On January 11, 1995, the OMRDD wrote to guardians of its TCF clients, advising that the City would continue payments for a limited time in order to permit TCF recipients to be placed in-state. The OMH sent a similar letter, dated February 27, 1995, informing the guardians that the City would provide transitional care payments for a limited period to facilitate the "orderly transfer of clients *seeking* placements in publicly funded programs operated or licensed by OMH" within New York State. (Emphasis added.) The letter continued, "Clients may, of course, *choose to remain* in their current placement *with the cost becoming the responsibility of the client or family*." (Emphasis added.) The letter concluded: "Please be

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[4] Remarkably, this letter is not in the Joint Appendix and apparently was not even in the record before the district court. *See* 908 F. Supp. at 1146 (citing only to the complaint).

assured that [OMH] is committed to providing smooth transfers to appropriate mental health programs."

During the first half of 1995, the OMRDD and the OMH attempted to place TCF recipients in State facilities. Of the 108 OMRDD clients from New York City, 58 accepted in-state placements and were removed from the TCF program by June 1, 1995. It is unclear how many of the unknown number of OMH clients receiving TCF have been similarly placed. It is undisputed, however, that there are no satisfactory in-state placements presently available to accommodate any of the plaintiffs.

C. The State Litigation.

On February 1, 1995, the New York Council for Exceptional People (an unincorporated association whose members are parents and guardians of TCF recipients) and three of the plaintiffs here (collectively, "NYCEP") filed an Article 78 petition (used to challenge New York State administrative actions) against OMRDD Commissioner Maul. The petition, filed in New York State Supreme Court in the County of New York, alleged that OMRDD was about to eliminate or alter the administrative procedures for effecting in-state placement of TCF recipients, in violation of the TCF Statute, other New York statutes, and the TCF recipients' "constitutional rights to procedural and substantive due process."

Late that month, NYCEP filed a lawsuit in the same court, seeking a declaratory judgment prohibiting the City and State from terminating transitional care. On March 31, 1995, NYCEP filed a "Restated Verified Second Amended Petition" and a "Restated Verified Complaint." NYCEP's new pleadings sought relief that would (1) forbid the City from "withdraw[ing] from the TCF

Program," or (2) require the State to assume 100% funding of transitional care expenses. NYCEP's claims in that lawsuit were based on New York State's constitution, the TCF Statute, and the January 31, 1995 Memorandum of Understanding between the HRA and the OMRDD.

On April 10, 1995, the state court granted judgment in favor of the defendants/respondents in the Article 78 proceeding, except on the due process claims and a statutory challenge, which the plaintiffs/petitioners were permitted to pursue in "post-hearing Article 78 proceedings."[5] The court also severed the "remaining claim for a declaratory judgment as to future funding" from the Article 78 proceeding. *New York Council for Exceptional People v. Pataki*, No. 102684/95 (N.Y. Sup. Ct. N.Y. County April 10, 1995).

Meanwhile, on May 30, 1995, the City notified the guardians that its $1.116 million had run out, and that the City would terminate transitional care on June 1, 1995.

The state court issued a ruling in the declaratory judgment action on June 13, 1995. Justice Freedman held that "neither the TCF Statute, the State constitution, nor the Memorandum of Understanding entitles the client plaintiffs to City or State funding."[6] *New York Council*

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[5] The order also qualified the judgment by providing that (1) no person receiving TCF could be transferred before the appointment and establishment of an advisory council, as described in the TCF Statute; and (2) at administrative hearings regarding prospective new placements, a TCF recipient may present evidence "with respect to the nature and suitability of his or her current placement."

[6] Justice Freedman's opinion does not discuss the due process claims raised by plaintiffs in their Article 78 petition, and we see no indication of a separate disposition in the record. The Article 78 proceeding seems to have been consolidated with the declaratory judgment action, since

for Exceptional People v. Pataki, No. 102684/95, slip op. at 9 (N.Y. Sup. Ct. N.Y. County June 13, 1995). The Appellate Division unanimously affirmed in October, 632 N.Y.S.2d 531, 531 (1st Dep't 1995); on February 20, 1996, the New York Court of Appeals denied leave to appeal. Mo. No. 14 (N.Y. Feb. 20, 1996) (unpublished slip op.)

Since we conclude that the judgment in the state litigation has substantial *res judicata* effects on most of the claims on which the preliminary injunction in this case is based, we outline the state court decision in some detail. The court described the funding crisis and its potential adverse effects on the plaintiffs as follows:

> In drafting the [TCF] Statute, it appears that the State legislature and then Governor Cuomo did not anticipate that a locality would withdraw from the transitional care program that had been in effect since 1982, and thus did not foresee that the Statute's provisions, as set forth in Soc. Serv. Law §§ 466(2) and (6), created a potential funding gap for four years until 1999. The Statute mandates that the State increase its reimbursement from 50% to 60% of locality expenditures as of 1995, and take over direct funding of the TCF Program as of 1999: but a loophole permits the State to expend no monies at all for the plaintiff clients. A locality's withdrawal form the TCF Program before 1999 results in certain clients being left without any funding source at all, whereas clients still in transitional care as of 1999 are assured State funding. This situation is inconsistent with the overarching funding

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both were identified by the same index number in New York State Supreme Court. The original declaratory judgment complaint is not in the Joint Appendix.

> scheme, which establishes an otherwise orderly plan for phasing out transitional care so as to minimize disruption and hardship to clients, and under which the State assumes an increasing portion of Program costs over time.
>
> Defendants' abrupt cessation of funding may jeopardize the welfare of particularly vulnerable citizens of this State.

New York Council for Exceptional People v. Pataki, No. 102684/95, slip op. at 10-11 (N.Y. Sup. Ct. N.Y. County June 13, 1995). The court also summarized plaintiffs' contentions:

> Plaintiffs do not concede that the City has a right to withdraw from the TCF Program, but argue that the State is obligated under the Statute to assume responsibility for all TCF Program costs for City residents which the City does not cover. To hold otherwise, plaintiffs claim, would thwart the legislature's intent for the State to assume over time the entire cost of the TCF Program. Plaintiffs point out that from 1982 through 1994, the State had been reimbursing localities for 50% of costs. Under the Statute, the State must now reimburse at a 60% rate, and take over all funding in 1999. Plaintiffs conclude that the Statute is "flexible enough to impose full State responsibility prior to 1999, *or* that the prior 1982-1994 program indicates the intent of coverage if the statute is silent on the issue of premature locality withdrawal." *Plaintiffs' Memorandum of Law* at 8.

Id. at 5. In granting the defendants' summary judgment motion and denying the plaintiffs' motion, the state court held:

> Social Services law § 466(2) provides that localities *may* participate in the TCF Program, for which they will receive *reimbursement* from the State. [Emphasis in original.] The only possible interpretation of this language is that *the localities' participation is voluntary and a condition precedent to any State obligations.* Inasmuch as the City has withdrawn from the TCF Program, there is nothing to reimburse, and accordingly *the State has no current duty to contribute any monies to the client plaintiffs' transitional care.*
>
> In any event, Section 16 of the Statute is dispositive of plaintiffs' motion. That provision unambiguously states that no provision of the statute shall be construed to create for any individual a "right, interest or entitlement to services, funds or placement." In view of this pronouncement, *this Court cannot deem the State to be the guarantor of the client plaintiffs' transitional care funding.*

Id. (emphasis added).

D. The July Fourth Weekend Transfer.

Following the issuance of Justice Freedman's opinion on June 13, 1995, the State made arrangements for the transfer of some of its clients to in-state facilities. One such transfer, scheduled for the Fourth of July weekend, led to an incident that plaintiffs have focused on in their federal litigation. On the Friday preceding the four-day holiday weekend, the OMH advised the Devereux Institute (an out-of-state facility at which some of plaintiffs reside)[7] that buses would arrive on Monday, July 3, to transport nine TCF residents to facilities in Utica and

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[7] The Joint Appendix does not indicate in which state the Devereux Institute is located.

Amsterdam, New York. This arrangement was made without the consent or knowledge of the guardians, who learned of the transfer from the institute and promptly intervened to prevent it. A new transfer date of July 7 was set, but no transfer took place, and the nine plaintiffs have remained at Devereux.

E. The Federal Litigation.

On July 20, 1995, in the aftermath of these developments, plaintiffs and their guardians commenced this action pursuant to 42 U.S.C. § 1983, against the Governor and the Commissioners of the OMRDD, the OMH, and the State's Department of Social Services (the "State Defendants").[8] The complaint asserts the existence of certain constitutional rights under the Fourteenth Amendment:

> 19. These rights include, without limitation:
>
> (a) a life interest in continued care, including adequate food, shelter, clothing, and medical care;
>
> (b) a liberty interest in the provision of adequate and appropriate care and treatment, including safe conditions and freedom from undue bodily restraint;
>
> (c) a property interest in the funding of such care;
>
> (d) a due process interest in notice and hearing prior to the removal of rights established by state statute;

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[8] Additional parties not part of this expedited appeal—the City of New York and some of its agencies and officials—were also named as defendants.

(e) an equal protection interest in allocation of funds.

These rights are alleged to have been violated as follows:

20. Those rights were adequately protected by the TCF Program up to October 25, 1994. They have been violated from and after June 1, 1995 as to funding; from and after July 13, 1995 as to denial of hearings, and from and after various earlier dates as to other pleaded acts, or failures to act.

Plaintiffs also alleged that there were no suitable in-state facilities for them:

14. From 1982 to 1994, the New York Legislature and the governors then in office made findings that no facilities appropriate for the Beneficiaries were available within New York State.

15. On information and belief, no new facilities have been constructed, and no existing facilities have been remodeled to meet the special and unique needs of the Beneficiaries.

The complaint alleged four causes of action. On September 15, 1995, plaintiffs filed an amended complaint that added six other claims. Of the ten claims, eight ask for injunctive relief.[9] The first, second, third, and fourth claims allege due process and equal protection violations based on the failure of all of the defendants to continue making TCF payments for plaintiffs after the City discontinued its funding. The fifth and sixth claims are similar, alleging that correspondence sent by the State and the City to the guardians created an

[9] The eighth and tenth claims sought damages from Governor Pataki, the OMRDD, and the OMH.

obligation for all defendants to provide "orderly placement" and transition following the City's announced discontinuation of funding. The seventh claim is based on the uncompleted transfer over the Fourth of July weekend, alleging a "separate and distinct violation of constitutional rights by OMH." The ninth claim alleges "coercive conduct" by the OMRDD in its unsuccessful attempts to place OMRDD clients. All eight of these claims ask for some form of injunctive relief that would assure immediate, full and retroactive State funding of out-of-state placements, and that would implement the procedural mechanism for in-state transfers set forth in the TCF Statute.

In the first of two published opinions, the district court granted a preliminary injunction ordering the State Defendants to provide full funding immediately for plaintiffs' out-of-state care. 908 F. Supp. 1142, 1156 (E.D.N.Y. 1995). First, the court found that the placement of plaintiffs in out-of-state facilities constituted a state action by the State Defendants. *Id.* at 1149-50. Addressing plaintiffs' due process claims, the court decided that "the minimum constitutional standard applicable" to the placement of the plaintiffs "requires ascertaining whether 'professional judgment in fact was exercised.' " *Id.* at 1150 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)). The court reasoned that, since the State "accepts the necessity for residential placement for these plaintiffs," and since plaintiffs would be entitled to State-funded care if they were placed in-state, the State "is obligated to exercise professional judgment to find, and professionally plan transition to, suitable facilities" for plaintiffs. *Id.* at 1151.

Turning to the actions of State officials in connection with the July Fourth episode, the court found that these

actions were "manifestly unprofessional," violated plaintiffs' constitutional rights, and "threatened them with irreparable harm." *Id.* at 1151-52. Further, "[t]he abrupt cessation of funding for placements without an orderly transition, in violation of the announced procedures of both OMH and OMRDD, continues to threaten plaintiffs with irreparable harm." *Id.* at 1152. Relying on *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1246 (2d Cir. 1984), the court concluded that:

> Where, as here, the recipients are not only dependent upon the State, but the State also has made assurances [in correspondence] that the transition would be "smooth," it must be *estopped from peremptorily removing funding—even if there is no entitlement*—without at least following the process it led plaintiffs to expect.

908 F. Supp. at 1152 (emphasis added). Accordingly, the court held that due process could only be satisfied if the State provided funding to maintain plaintiffs in their present placements until they could be properly transferred in-state. *Id.* at 1153.

The court also found that plaintiffs had raised "a significant equal protection issue that should be addressed in subsequent proceedings." *Id.* at 1154. Preliminary injunctive relief was appropriate on this ground as well, said the court, because plaintiffs would suffer irreparable harm without the injunction; because their constitutional claims furnished "a fair ground for litigation with a real possibility for success on the merits"; and because the balance of hardships tipped in their favor. *Id.* at 1154-55.

The court rejected the State's *res judicata* defense in the following terms:

> The issues and transactions on which this order are based are not the subject of pending or completed state proceedings. Federal law looks to the applicable state res judicata principles. The claim is based on constitutional violations occurring after the resolution of [the] *NYCEP* [case] in state court. Final resolution of the funding issue in state court (now affirmed by the Appellate Division for the First Department . . .) did not authorize the State to subject plaintiffs to unconstitutional treatment by depriving them of their interest in humane institutionalization without procedural due process.

Id. at 1156 (citations and footnote omitted). After the State renewed its argument that the claims underlying the injunction are barred by *res judicata*, the court rejected the argument again, in a second opinion issued on December 4, 1995:

> This court continues to disagree, holding that the State's precipitate actions following the end of TCF in June 1995 inflicted new constitutional injury upon the plaintiffs that could not have been raised in litigation concluded prior to its occurrence. Final resolution of the funding issue in state court (now affirmed by the Appellate Division for the First Department . . .) did not authorize the State to subject plaintiffs to unconstitutional treatment by depriving them of their interest in humane institutionalization without procedural due process.

908 F. Supp. 1157, 1162 (E.D.N.Y. 1995). Relying on *Balderman v. U.S. Veterans Admin.*, 870 F.2d 57, 62 (2d Cir. 1989), the court held that these plaintiffs could not have litigated "abrupt unreviewed transfers by the State until the State actually undertook such action" after the state litigation was concluded. 908 F. Supp. at 1162.

The injunction, as revised by the second opinion, ordered the State defendants

> to take all necessary steps, including but not limited to payment of out-of-state facilities at which plaintiffs currently reside, to maintain plaintiffs in their present placement until, following evaluation procedures evincing the exercise of professional judgment, in compliance with the standards enunciated in *Youngberg* and *Good Will*, orderly transition to permanent State approved placement is accomplished. Orderly transition is to include the proposal of, and opportunity to visit, appropriate, available, long-term placements plus an opportunity for the plaintiffs and their parents/guardians to obtain independent administrative and/or judicial review.

Id. at 1165.

DISCUSSION

A motion for a preliminary injunction should not be granted unless the movant demonstrates (1) irreparable harm and (2) either (a) likelihood of success on the merits or (b) "sufficiently serious questions" on the merits and a balance of hardships "tipping decidedly" in the movant's favor. *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979). We review for abuse of discretion the district court's grant of the preliminary injunction. *Blum v. Schlegel*, 18 F.3d 1005, 1010 (2d Cir. 1994). An injunction issued on the basis of an error in law is one example of an abuse of discretion. *County of Seneca v. Cheney*, 12 F.3d 8, 11 (2d Cir. 1994).

The State Defendants claim that the district court erred, because (1) they did not receive a full opportunity for a hearing before the district court; (2) this litigation is barred by *res judicata*; and (3) federal court abstention is appropriate in light of pending state court litigation. In light of our disposition, we do not address the first of these arguments. The third argument is moot, as New York State's highest court has denied leave to appeal in the state court litigation. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976) (abstention is appropriate when a federal constitutional issue "might" be mooted by a state court determination of pertinent state law); *Turnbow v. Pacific Mut. Life Ins. Co.*, 934 F.2d 1100, 1104 (9th Cir. 1991) (abstention issue mooted by decision of state's highest court).

Although the preliminary injunction grants plaintiffs substantially the relief that they sought but failed to obtain in state court (*i.e.*, maintenance of transitional care and TCF), the district court held in both of its decisions that *res judicata* did not apply, because (1) the State had assumed a duty to assist plaintiffs' transition to in-state placement, independent of the TCF Statute; (2) the State Defendants breached this duty by failing to implement the orderly transition of plaintiffs to in-state facilities (most notably in the episode over the Fourth of July weekend); and (3) this breach amounted to a constitutional violation that postdates the State court litigation. 908 F. Supp. at 1156; 908 F. Supp. at 1162.

We agree with the district court that, if plaintiffs had alleged a separate injury by the State Defendants that was subsequent and unrelated to the subject of the State court litigation, and a proper remedy for the separate injury was maintenance of TCF, then *res judicata* would

be no bar to the preliminary injunction. However, we conclude that there is no such separate injury for which this injunction is a proper remedy.

A. Res Judicata

Although we are considering the propriety of a preliminary injunction rather than a final determination of the merits, we must evaluate whether and to what extent the doctrine of *res judicata* bars the claims on which the injunction rests.

In the *NYCEP* litigation, the New York State Supreme Court held that "neither the TCF Statute, the State constitution, nor the [January 31, 1995 Memorandum of Understanding between the HRA and the OMRDD] entitles the client plaintiffs to City or State [transitional care] funding." *NYCEP v. Pataki*, No. 102684/95, slip op. at 9 (N.Y. Sup. Ct. N.Y. County June 13, 1995). We must accord this state court judgment the preclusive effect that would be given it by the New York courts. 28 U.S.C. § 1738; *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994). In New York, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *O'Brien v. City of Syracuse*. 54 N.Y.2d 353, 357, 445 N.Y.S.2d 687, 688 (1981). It is undisputed that the other requirements of *res judicata* are satisfied: the plaintiffs here sued these defendants in the prior forum, *see* 908 F. Supp. at 1144, n.2, and the prior forum had the power to grant the relief sought here. *See Davidson v. Capuano*, 792 F.2d 275, 278 (2d Cir. 1986); *Fay v. South Colonie Central School Dist.*, 802 F.2d 21, 28-29 (2d Cir. 1986). The only ground urged by plaintiffs to avoid *res judicata*, as the district court recognized, 908

F. Supp. at 1156, was that some counts in their amended complaint seek injunctive relief in respect of events that postdate the state court proceedings.

The first four claims raised in plaintiffs' amended complaint, alleging denial of procedural due process, substantive due process and equal protection, are completely barred by *res judicata*, because the underlying factual predicate for each of these claims—which concern the TCF reimbursement mechanism, the TCF Statute, the City's termination of transitional care, and the plaintiffs' resulting predicament—is substantially identical to the allegations presented in state court. *See Schulz v. Williams*, 44 F.3d 48, 55 (2d Cir. 1994) (*res judicata* barred one plaintiff's federal constitutional claims, which could have been raised by that plaintiff in New York state court litigation).

Similarly, we conclude that *res judicata* bars plaintiffs' fifth cause of action, which is based on letters to the guardians (1) from the HRA, dated December 7, 1994; (2) from the OMRDD, dated January 11, 1995; and (3) from the OMH, dated February 27, 1995. Plaintiffs claimed that, by virtue of these letters, all defendants assumed a duty to effect orderly transitions into in-state facilities, with "continued" transitional care throughout the transition process, and that this duty was breached "by withdrawal and denial of funding" prior to plaintiffs' orderly transition into appropriate in-state facilities. These facts, however, are part and parcel of the "same transaction or series of transactions" presented to the state court.

The district court, relying on the assurance of "smooth" transfers in the cited correspondence, held that the State "must be estopped from peremptorily removing funding—even if there is no entitlement—without at

least following the process it led plaintiffs to expect." 908 F. Supp. at 1152. This estoppel argument could have been made to the state court, because all three of the letters predated the March 31, 1995 filing of the "Restated Verified Complaint" and the "Restated Verified Second Amended Petition" in state court.

We understand the district court's opinion to say that no *res judicata* bar should fall on arguments addressed to the "peremptor[y] remov[al] [of] funding" because the actual termination of funding postdated the state court judgment, and the "peremptor[y]" character of that funding withdrawal could not be anticipated beforehand. Thus, the district court concluded that the plaintiffs' action accrued *after* Justice Freedman issued her opinion on June 13, 1995. The City, however, had already declared its intention to end funding, and the State had already disclaimed entitlement in the categorical language of the TCF Statute, *before* the final state court pleadings were filed. Plaintiffs had every reason to understand that the positions taken by the City and the State would leave them "stranded," *id.* at 1152; indeed, Justice Freedman's opinion anticipated the "abrupt cessation of funding" and stated that it "may jeopardize the welfare of particularly vulnerable citizens of the State." *NYCEP*, slip op. at 11 (June 13, 1995). In sum, the fifth claim for relief is also barred by *res judicata*.[10]

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[10] Moreover, even if one assumed that a bureaucrat could create an open-ended funding obligation that the legislature disclaims, our review of the correspondence assures us that the State did not mislead the guardians.

The February 27, 1995 letter from the State's OMH to the plaintiffs' guardians lays out in detail a four-step process designed to ensure that plaintiffs and their guardians can prevent an inappropriate or unacceptable in-state placement, and the district court cites these procedures as one foundation for plaintiffs' due process claim. (The January 11,

Although not discussed by the district court, we also hold that plaintiffs' ninth claim is barred by *res judicata*. The ninth claim alleges that, "[f]rom and after 11 January 1995, and continuing through the present," OMRDD personnel engaged in "coercive conduct in connection with proposed or nominated transfers," including threats that transitional care would be terminated. Plaintiffs claimed that "[t]his conduct constitutes a separate and distinct violation of constitutional rights by OMRDD." Again, plaintiffs here allege a cause of action on the same set of facts presented before the state court in the prior litigation. This claim that could have been raised in state court is now barred by *res judicata*.

Of the remaining four claims (six through ten), two (eight and ten) seek damages only and do not bear upon this injunction. The sixth was not relied upon by the district court.[11] The court did stress the seventh claim, how-

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1995 letter is a similar letter sent by OMRDD to its clients and their guardians.) However, the paragraph that is the preamble to these enumerated procedures makes plain that the State was assuming no obligation to fund out-of-state placements after the City's withdrawal:

> The City HRA has agreed to continue providing [TCF] payments for a short time to enable the orderly transfer of clients seeking placements in publicly funded programs operated or licensed by OMH. *Clients may, of course, choose to remain in their current placement with the cost becoming the responsibility of the client or family.* For those individuals who seek placement in publicly funded programs operated or licensed by OMH, a regulation will be adopted establishing the following process: . . . .

(Emphasis added.) We do not see how the only undertaking in the letter—to afford procedural safeguards against an involuntary transfer to an institution rejected by the guardians—can be transmuted into an entitlement to continued funding for the out-of-state placement.

[11] The sixth claim alleges that, through correspondence dated on or after June 27, 1995, "[a]ll defendants ratified the assumption of the duty of orderly placement despite withdrawal of funding." Although this claim alleges facts that postdate the state court litigation, our due process analysis below demonstrates that this claim cannot support injunctive relief.

ever, which arises out of the July Fourth weekend episode and therefore pleads events and transactions that postdate the state court proceedings. The court concluded that this claim presented "sufficiently serious questions" on the issue of whether plaintiffs' rights to due process were violated. 908 F. Supp. at 1154. We now address that analysis.

B. Due Process and the July Fourth Weekend Transfer

The seventh claim for relief alleges that the State's attempted transfer of certain plaintiffs over the 1995 July Fourth weekend "constitute a separate and distinct violation of constitutional rights by OMH," and demands

> mandatory injunctive relief: (a) directing all defendants to restore funding from June 1, 1995, *nunc pro tunc*, at the levels then in place; [and] (b) continuing such order as to each [plaintiff] until a constitutionally appropriate transfer hearing has been held, and an appeal of any determination adverse to the [plaintiff] has been heard and determined in the state courts.

The district court's preliminary injunction affords precisely this relief against the State Defendants. 908 F. Supp. at 1156. The court held that the State Defendants, by their prior actions, had assumed duties under the Due Process Clause to provide professionally adequate in-state placements for plaintiffs, to effect these placements via an orderly transfer, and to conduct the transfer subject to rights of administrative and judicial review. *Id.* at 1152-53. The State Defendants breached this duty during the July Fourth weekend episode, said the court, by failing to arrange in-state placements and by attempting to move plaintiffs without consent or hearings to unsatisfactory in-state placements. *Id.* The rem-

edy for this breach, according to the court, was (1) to stop all transfers to in-state facilities unless the transfer met due process requirements of adequate care and hearings, and (2) to resume immediately full funding for the plaintiffs' out-of-state care until the appropriate transfers take place. *Id.* at 1153.

We conclude, first, that the State Defendants had no duty under the Due Process Clause to provide professionally adequate care to the plaintiffs, and therefore have no duty to resume TCF payments for the plaintiffs' out-of-state care. Second, we conclude that the July Fourth weekend episode amounted to a breach of the State Defendants' duty to ensure that involuntary transfers are constitutionally appropriate, but that this injunction is not the appropriate remedy for this breach.[12]

1. The Funding Obligation

After finding state action,[13] the district court held that the State Defendants have a due process obligation under

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[12] The doctrine of collateral estoppel does not bar us from considering these federal due process issues. Under New York law, collateral estoppel applies if "[f]irst, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination." *Kaufman v. Eli Lilly Co.*, 65 N.Y.2d 449, 455, 492 N.Y.S.2d 584, 588 (1985). Plaintiffs had raised issues of "constitutional rights to procedural and substantive due process" in their Article 78 proceeding to compel administrative hearings, but these issues were not dealt with by the state court either in its April 10, 1995 order (which severed and reserved these issues for "post-hearing Article 78 proceedings") or in its June 13, 1995 disposition of the declaratory judgment action.

[13] The district court relied on *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 546 (1987) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)), for the principle that institutionalization amounts to state action for purpose of § 1983 where the government " 'has exercised coercive power or has provided such sig-

Youngberg v. Romeo, 457 U.S. 307, 321 (1982), to exercise "professional judgment" in establishing safe conditions and freedom from undue restraint, and a duty under *Society for Good Will*, 737 F.2d 1239, 1250 (2d Cir. 1984), "to exercise professional judgment in devising programs that seek to allow patients to live as humanely and decently as when they entered the school," and to assure that the "residents maintain the[ir] fundamental self-care skills." *See* 908 F. Supp. at 1150-51.

We conclude that the district court erred in relying upon *Youngberg* and *Society for Good Will*. *Society for Good Will* dealt with the level of care required by the Due Process Clause, but the state's obligation to provide care and funding in that case was undisputed. When, however, the government disclaims any entitlement to continued funding, and then ends this funding, the reach of *Society for Good Will* is controlled by the Supreme Court's subsequent holding in *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989): "[T]he Due Process Clauses [of the Fifth and Fourteenth Amendments] generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id.* at 196. In *DeShaney*, a child who was abused by his father

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nificant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government].' " 908 F. Supp. at 1149. This is problematic because the preliminary injunction runs against the State of New York, whereas it was the City of New York that initially effected the out-of-state placements. The district court, however, gives "primacy" to the role of the State because the State approved out-of-state placements, monitored out-of-state facilities, and in essence is deemed to have caused the out-of-state placement by its failure to find a satisfactory in-state placement. *Id.* at 1150. We accept the idea of state action in this case *arguendo*.

contended that the state social welfare service breached its duty under the Due Process Clause to protect him, because the agencies knew about the danger of abuse "and specifically proclaimed, by word and by deed, its intention to protect him against that danger." *Id.* at 197. The issue was whether the State thereby "acquired an affirmative 'duty' " that was "enforceable through the Due Process Clause." *Id.* The Supreme Court rejected this theory of liability: "It may well be that, by voluntarily undertaking to protect Joshua against a danger it concededly played no part in creating, the State acquired a duty under state tort law to provide him with adequate protection against that danger." *Id.* at 201-02. However, "the claim here is based on the Due Process Clause of the Fourteenth Amendment, which, as we have said many times, does not transform every tort committed by a state actor into a constitutional violation." *Id.* at 202.

The Supreme Court did acknowledge that the due process obligation created by cases like *Youngberg*, which involved the security of involuntarily committed mental patients, or *Estelle v. Gamble*, 429 U.S. 97 (1976), which involved the provision of medical care to incarcerated prisoners, was still valid, but only as an exception that applied to "certain limited circumstances." *DeShaney*, 489 U.S. at 198-99. The Court explained that these cases "stand only for the proposition that when the State takes a person into its custody and *holds him there against his will*, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id.* at 199-200 (emphasis added). The Court stressed that the involuntary nature of the commitment was determinative:

> The affirmative duty to protect arises *not* from the State's knowledge of the individual's predicament

> or from its expression of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id. at 200 (emphasis added and citation omitted).

Plaintiffs here are under no state-imposed restraint. The whole effort of the guardians, here and in state court, has been to prolong the involvement of the City and the State in the funding of institutional placements as to which the City and the State have washed their hands. *DeShaney* therefore subverts the district court's conclusion that the State Defendants had assumed "by word and by deed," *id.* at 197, a duty to provide plaintiffs a smooth and orderly transition to in-state care, including continuous full funding of out-of-state care prior to their transfer. *DeShaney* flatly rejected as the sole ground for a due process right an expressed intent to provide assistance, or even a failed initiative to do so. *See Philadelphia Police & Fire Ass'n for Handicapped Children, Inc. v. City of Philadelphia*, 874 F.2d 156, 166-68 (3d Cir. 1989) (fact that state had been providing home services to mentally retarded individuals did not create due process right to continued services). Therefore, the injunction cannot be premised on a duty to "exercise professional judgment" under *Youngberg* and *Society for Good Will*, because there is no such duty here.

2. July Fourth Weekend Transfer

The district court outlined in some detail "OMH's precipitate actions" in the abortive transfer of nine individuals from the Devereux Institute over the July Fourth weekend. *See* 908 F. Supp. at 1148-49 & n.13. Boiled down, the district court's findings demonstrate that some or all of these individuals were incapable of giving their consent to being moved from the institute, and that the OMH attempted to transfer them involuntarily to another institution, without the consent of their guardians.

An attempt by the State to force involuntary commitment to an institution or to otherwise involuntarily restrain an individual implicates at least an individual's right to procedural due process. *See Jones v. United States*, 463 U.S. 354, 361 (1983) ("It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.") (internal quotation omitted). By attempting to seize and transport plaintiffs to in-state institutions without the consent of their guardians and without providing adequate procedural due process guarantees, the State Defendants threatened a violation of plaintiffs' due process rights. The question is, what remedy is appropriate for this wrong?

The injunction has two remedial elements: (i) resumption of full funding of plaintiffs' out-of-state care; and, (ii) when or if plaintiffs are transferred to in-state facilities, compliance with an "orderly" transfer process that includes procedural due process guarantees.

(i) Funding. The due process right against deprivation of liberty, implicated by the attempted July Fourth weekend transfer, is distinct from an asserted right to receive voluntary institutional care from the State, impli-

cated by the termination of funding. As we have already discussed, under *DeShaney*, plaintiffs have no independent due process right to funded care from the State Defendants. The district court addressed this issue by engrafting the involuntary character of the attempted transfer onto the overall institutional status of the plaintiffs. It therefore concluded that the due process obligation restricting involuntary transfers automatically created a due process obligation to fund the plaintiffs' current institutional placements. 908 F. Supp. at 1153. But the loss of funding for voluntary private institutional care does not restrict plaintiffs' liberty (and does not implicate the Due Process Clause) as would an involuntary transfer. *See DeShaney*, 489 U.S. at 196-97. A due process violation was threatened during the July Fourth weekend, but that wrong cannot support an injunction that imposes an expansive duty for the State Defendants to provide immediate full funding. The district court lacked the power to deploy the State's resources in this way. Injunctive relief should be "narrowly tailored" to address specific harms and "not impose unnecessary burdens on lawful activity." *Waldman Publishing Corp. v. Landoll, Inc.*, 43 F.3d 775, 785 (2d Cir. 1994) (citing *Society for Good Will*, 737 F.2d at 1251).

(ii) Transfer Process. The injunctive requirement that the transfer process must be "orderly" and constitutionally appropriate could be supported only to the extent that a transfer is involuntary, as was the transfer attempted over the July Fourth weekend. We do not doubt that, if the district court had found an "actual and imminent" likelihood of future abuses similar to the July Fourth weekend episode, the district court could remedy it by injunction. *Tom Doherty Assocs., Inc. v. Saban*

Entertainment, Inc., 60 F.3d 27, 37 (2d Cir. 1995). But the district court made no such finding. At most, the district court found that cessation of TCF "will *inevitably*" force the State to make "a hasty transfer" of plaintiffs, 908 F. Supp. at 1155 (emphasis added); but this conclusory statement is unsupported. There is no finding whatsoever of any "actual and imminent" threat that the State will renew its attempt to effect an involuntary transfer. The extraordinary remedy of an injunction is unavailable absent such a finding. Nor does the cessation of transitional care "inevitably" mean "hasty transfer[s]" by the State, because the State's disclaimer of any funding obligation until 1999 does not require the relocation of any of its clients. We therefore conclude that this injunction is not needed to prevent irreparable harm that may result from the threatened violation of plaintiffs' rights over the July Fourth weekend, or that might flow from any similar incident in the future.

CONCLUSION

For the reasons set forth above, we vacate the preliminary injunction and remand.

PARKER, *Circuit Judge*, dissenting:

I do not agree that Judge Trager abused his discretion in granting the preliminary injunction.

The plaintiffs, who were placed as children, are sufficiently disabled that they have no ability to care for themselves, nor do they have any ability to choose what their living and care arrangements should be. Beginning in 1982, the plaintiffs turned twenty-one and "aged out"

of their federally-funded educational program. The counties and localities, which originally placed the plaintiffs with State approval in out-of-state facilities, decided to continue their placement out-of-state because there was a shortage of in-state facilities. At that time, the State chose to bear 50% of the cost of care.

The plaintiffs, as adults, came under State supervision either through the New York State Office for Mental Retardation and Developmental Disabilities ("OMRDD") or through the New York State Office of Mental Hygiene ("OMH"), which were required to arrange for their transfer[1] to appropriate in-state adult care facilities. Those State offices, however, did little to arrange the transfers, apparently because in-state facilities were not available.

In 1994, transfer procedures and funding were codified in the Transitional Care Funding ("TCF") statute. N.Y. Soc. Serv. L. §§ 466 to 466-b (McKinney Supp. 1996). Pursuant to the TCF statute, § 466, the State agreed to increase its share of the cost of care from 50% to 60% for the period 1995 to 1999 and agreed to assume 100% of the cost thereafter. Despite the increased State funding, in the fall of 1994, New York City decided to cut off funding after 1994. The City later extended funding through the first half of 1995.

While the State does not have a statutory obligation to continue funding the out-of-state services, it does have a statutory obligation to provide in-state services and to transfer the plaintiffs to those services.[2] Furthermore, as

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[1] *See* N.Y. Soc. Serv. Law § 473(1) (McKinney Supp. 1996) (quoted at *infra* n.2). This statute has been in effect since 1975.

[2] Section 473 of the New York Social Service Law provides:

> 1. In addition to services provided by social service officials pursuant to other provisions of this chapter, such officials *shall provide protective services* in accordance with federal and state regulations

provided by the TCF statute, the State has promulgated procedures to place plaintiffs responsibly in in-state facilities while out-of-state care is phased out.[3]

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to or for individuals without regard to income who, because of mental or physical impairments, are unable to manage their own resources, carry out the activities of daily living, or protect themselves from . . . active, passive or self neglect . . . or other hazardous situations without assistance from others and have no one available who is willing and able to assist them responsibly. Such services shall include:

. . . .

(c) arranging, when necessary, for commitment, guardianship, or other protective placement of such individuals either directly or through referral to another appropriate agency, provided, however, that where possible, the least restrictive of these measures shall be employed before more restrictive controls are imposed;

(d) providing services to assist such individuals to move from situations which are, or are likely to become, hazardous to their health and well being . . . .

N.Y. Soc. Serv. Law. § 473 (emphasis added).

[3] The TCF statute provides:

5. Social services districts shall discontinue payments for transitional care, in accordance with procedures established by the department, for any individual:

(a) who has been offered an appropriate, available adult placement or adult services, based upon a notification from the department that such an offer has been made and accepted, or has been made and upheld by an administrative hearing, or has been made and the time to request an administrative appeal has expired;

. . . .

(c) who is residing in a facility which has failed or refused to meet its obligations pursuant to this article as a condition of funding, based on a notice from the department that it has made such a determination and that the office of mental health or the office of mental retardation and developmental disabilities, if necessary and appropriate, offer an adult placement to the individual on an expedited basis.

N.Y. Soc. Serv. Law § 466.

The State agencies were aware of their obligation to place these individuals in facilities located in New York State, but failed to do so. This gave rise to the fiasco of the weekend of July 4, 1995. With no notice to the patients, or their guardians, and with only three days notice to the care facilities, the State attempted to pick up these individuals and involuntarily transfer them into facilities in New York State. There was no suggestion that any orderly transition would be forthcoming, or that any modicum of professional judgment would be exercised to determine the appropriateness of the transfers or the transferee facilities. This all occurred despite earlier representations from OMRDD and OMH that transitional care payments would be made to support the "orderly transfer of clients," and a June 27, 1995 letter from Governor Pataki indicating that these individuals would be "offered appropriate placements, assimilating into the adult care system . . . ."

Against this factual background, I cannot agree that the plaintiffs' substantive due process claim is barred in any way either by *res judicata* or by the holding of *DeShaney v. Winnebago County Dep't. of Social Servs.*, 489 U.S. 189 (1989).

With regard to *res judicata*, during the pendency of the New York State litigation, various State officials represented that an orderly transition from out-of-state to in-state facilities would be made. In the face of those representations, plaintiffs should not be expected to have anticipated an abrupt funding cutoff. Nor could plaintiffs have anticipated an inhumane attempt to transfer as the State attempted to do on July 3, 1995, after the New York State litigation was complete.

Nor am I persuaded by the majority's reliance on the Supreme Court's decision in *DeShaney*. In *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982), the Supreme Court held that the Due Process Clause requires the State to provide adequate food, shelter, clothing, medical care, personal security, protection from arbitrary restraint and certain minimum services to persons who are in State care. In fulfilling those obligations, the State is given great deference so long as it determines the level of appropriate service by an exercise of professional judgment. *Id.* at 321-23. *Youngberg*, of course, involved an involuntary commitment of a mentally disabled person. This court's holding in *Society For Good Will To Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1245-47 (2d Cir. 1984) ("*Good Will*"), was not so limited. That case dealt with the due process rights of mentally disabled residents of a State-operated school. Without deciding whether the residents were voluntarily or involuntarily admitted to the school, the court found the residents to be dependent upon the State. On the basis of their dependency, the court explained that the State had a duty to house them in a manner which does not deprive them of due process. The State was required to exercise professional judgment in determining appropriate care. *Id. Youngberg* and *Good Will* recognize a basic due process right to humane treatment while in state care.

Although *DeShaney* may have limited *Good Will* to some extent, I do not believe that *DeShaney* in any way overruled *Good Will*. In *DeShaney* a minor child, Joshua DeShaney, sought to hold state social workers liable under the Due Process Clause for having failed to protect him from abuse by his father who had custody. *DeShaney* simply held that the Due Process Clause does not require the State to protect a person who is not in

State custody from acts of private persons. The Court relied on the fact that the Due Process Clause protects people from state action, not private actions.

In *DeShaney* the Court also noted:

> Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect. Indeed, several Courts of Appeals have held, by analogy to *Estelle* [*v. Gamble*, 429 U.S. 97 (1976) (requiring States to provide adequate medical care to prisoners)] and *Youngberg*, that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents. We express no view on the validity of this analogy, however, as it is not before us in the present case.

489 U.S. at 201 n.9 (citations omitted). The plaintiffs here, as in *Good Will*, receive their care as a result of state action and hence fall closer to the foster care analogy, which *DeShaney* explicitly declined to reach, than to the private action from which the Court in *DeShaney* held no due process rights arise. Accordingly, *DeShaney* does not undermine the holding of *Good Will*: that due process requires that mentally disabled persons who are dependent on the State for their care must receive treatment in accordance with standards of professional judgment.

In *DeShaney*, the Court stressed that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did

it do anything to render him any more vulnerable to them." 489 U.S. at 201. In the instant case, however, the district court found that for many plaintiffs "the State is de facto, if not de jure, guardian." 908 F. Supp. 1142, 1149 (E.D.N.Y. 1995). The plaintiffs are adult people who have been living in out-of-state facilities approved, supervised and funded in part by the State. Given this factual scenario, I cannot agree that the district court abused its discretion when it found that these plaintiffs are in the custody of the State for purposes of effecting an orderly transfer to in-state facilities.

Plaintiffs have a due process right to a minimal degree of care based upon professional judgment. This conclusion stems from several factors, including: plaintiffs' previously created dependence upon the State; plaintiffs' inability to make basic decisions for themselves, or to care for themselves; and the State's unfulfilled obligation to provide in-state care for the plaintiffs.

We should not disturb Judge Trager's conclusions that there are sufficiently serious questions regarding the risk of further abuse of the plaintiffs' substantive due process rights, and that the balance of hardships tips decidedly in plaintiffs' favor.[4] These plaintiffs are particularly vulnerable to change. The actions of the State over the weekend of July 4, 1995, demonstrate that these plaintiffs can be substantially harmed by State action—namely, attempts to transfer the plaintiffs without ade-

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[4] The district court did not need to find an "actual and imminent" likelihood of future abuses involving the threat of involuntary transfer, though the majority suggests it must at 31-32. As the majority correctly noted at 18, the court only needed to find "sufficiently serious questions" of such abuses given a balance of hardships that tips "decidedly" in the plaintiffs' favor. We should not forget this alternative ground for granting a preliminary injunction, particularly since it is the ground relied on by the district court, 908 F. Supp. at 1154.

quately considering the appropriateness of the means of transfer, or of the facilities to which the transfer occurs.

Given the responsibility of the State to provide minimal care and not to inflict the harm that a disorderly transition could cause, it is hardly a stretch to conclude that there was an attempt to violate plaintiffs' substantive due process rights. Without injunctive relief, the State may violate the due process rights of these plaintiffs in the future. It is hardly an answer to suggest, as the majority does, that a more limited injunction (presumably an order not to repeat the events of the July Fourth weekend) will suffice. If funding is cut off, an orderly transition cannot occur because any additional attempts by the State to move the plaintiffs will again be forced by the threat of eviction rather than determined by the medical needs of the plaintiffs and the capabilities of available in-state-facilities. There is substantial risk that hasty decisions made under the threat of eviction will result in ill-considered, poorly executed in-state placements that endanger the health of the plaintiffs. This risk is particularly acute given the continuing dearth of in-state-facilities capable of adequately caring for the plaintiffs, a dearth that has persisted for more than a decade and that is unlikely to end before the out-of-state facilities run out of funds to care for the plaintiffs.

The district court's decision to order the State to fund transitional care was not an abuse of discretion. I respectfully dissent.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. CV-95-2902 (DGT)

LYNDA BROOKS; VERNA HOBSON; GERALDINE BAVARO; HARRIET EATON; JANE DOE; and RICHARD DOE, as parents and guardians of, respectively, Michael Brooks; Theresa Hobson; Lisa Bavaro; Jill Eaton; Joe Doe; and Rachel Roe,

Plaintiffs,

—against—

GEORGE E. PATAKI, as Governor of the State of New York; RUDOLPH W. GIULIANI, as Mayor of the City of New York; THOMAS A. MAUL; JOEL A. DVOSKIN; MARY GLASS; MARVA LIVINGSTON HAMMONS, as Commissioners of, respectively, the New York State Office of Mental Retardation and Developmental Disabilities; the New York Sate Office of Mental Health; the New York State Department of Social Services, and the New York City Human Resources Administration, Child Welfare Administration; and NEW YORK CITY,

Defendants.

MEMORANDUM AND ORDER

TRAGER, District Judge:

This case concerns the care and treatment of about fifty profoundly disabled and medically fragile individuals whose rights under the federal Constitution have been gravely imper-

iled as the result of an unfortunate funding dispute between the City and the State of New York.

Background

The present action has been brought by eighteen of these individuals and eight others who seek to intervene. *Shafran-Torres v. Pataki*, 95-CV-3803. Plaintiffs and intervenors are severely disabled individuals with multiple handicaps. By way of example, one is a twenty-six year old woman who has epilepsy and an IQ of about 70-72 as well as other disabilities. Tr. at 151. Another is a twenty-five year old, profoundly retarded, non-verbal woman. Pltf. Mot., Bavaro Aff. Seven of the eight proposed intervenors are profoundly autistic and pose potential danger, certainly, to themselves and, possibly, to others. *Shafran-Torres*, Compl. ¶ 57. All of the plaintiffs were originally placed in out-of-state residential care as children by New York City school and social service agencies, with the approval of the State Education Department, because no adequate programs or placements were available in New York. Educ. L. § 4401 & *see* McKinney's Commentary to Educ. L. § 4402, note 102. They remained in those placements even after they reached twenty-one, when the State's obligations to them under federal law expired. Their expenses were then paid under a formula in which localities were reimbursed by the State for fifty percent of the costs of continued placement. They now range in age from twenty-three to thirty-four.[1]

This dispute arose out of the City of New York's (the City) frustration with the State's failure to assume full funding of

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[1] This data was provided for the New York State Office of Mental Retardation and Developmental Mental Disabilities ("OMRDD") clients only, in the attachment to the NYC-OMRDD Memorandum of Understanding, 1/31/95, attached to City's Motion to Dismiss, Ex. C. Eight named plaintiffs are Office of Mental Health ("OMH") clients. Their ages are unknown, except for two about whom testimony was provided at the 9/10/95 hearing. They are 29 and 26. Tr. at 119 and 150.

this service, the residential placement of severely disabled adults, that is ordinarily solely a State responsibility and that will be a State responsibility once the plaintiffs are placed appropriately in New York. This frustration plus budgetary pressure led the City to withdrawal from the program under which it paid fifty percent of the costs of these individuals' care.

In addition to this litigation, two suits litigated in state court relate to this matter. In *New York Council for Emotional People v. Pataki*, ("*NYCEP*"), No. 102604/95 (Sup. Ct. N.Y. County), the parties are essentially the same as in this litigation.[2] There plaintiffs sought a declaratory judgment forbidding the City from withdrawing from the program under which it provided partial funding. In *City of New York v. Webb*, No. 40313/86 (Sup. Ct. N.Y. County), the City sued the State to recover the costs it incurred due to the State's failure to provide residential placements for City-referred individuals. Although plaintiffs in the present action were not parties to *Webb*, they were among those referred and, presumably, the amount assessed against the State in that action included the City's costs for their care over the period covered by the suit. *NYCEP* Appellants' Record on Appeal, 5/17/95 Rosenbaum Affirm. ¶ 5 at 135.

A. *Statutory History Of Transitional Care Funding (TCF)*

Transitional Care Funding for residential placement of disabled individuals who have "aged out" of educational placements was first included in the State budget in 1982, as a part of the Aid to Localities Budget. From April 1982 to July 1995, the State budget provided fifty percent reimbursement of local expenses for care of mentally and developmentally disabled adults who as children had been placed in residential

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[2] The City asserted and plaintiffs did not contest that the *Brooks* plaintiffs and *NYCEP* plaintiffs are identical. Only one plaintiff here was not a named plaintiff in *NYCEP*, and she is a leader in the NYCEP organization. City Mem. at 13-14. The intervenors were not parties to the *NYCEP* litigation in state court.

schools and institutions by local school districts. The Legislative History for the TCF statute noted: "New York assumed continued responsibility for [the] care [of children in residential care who had become twenty-one years old] until alternative programs could be identified, through enactment of appropriation authority to reimburse local social services district payments for transitional care." 1994 N.Y. Laws Ch. 600, Legislative History: Assembly Mem., City Mot. Ex. D at 000011. There was, however, no corresponding authority for transitional care in substantive law until the Transitional Care Statute was enacted in 1994. *Id.* at 000010. Costs increased from "$350,000 [in 1982] to a projected $26 million in the 1993-94 State fiscal year." *Id.* at 000011.[3]

In 1994, legislation was adopted increasing the State's share of transitional care costs to sixty percent, as of July 1, 1995, and establishing a timetable for the phase out of transitional care to eliminate intake to TCF in 1996 and provide for full state funding as of 1999. 1994 N.Y. Laws, Ch. 600. The Legislative History of the TCF Statute stated the justification for removing persons from out-of-state adult (non-child care) placements as: 1.) lack of "systemic procedures for the care and services provided by out of-State facilities

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[3] Over the years, delays in passage of the state budget beyond the beginning of the State Fiscal Year on April 1 likely created funding gaps. *The New York Times* noted, on July 18, 1993, that "the state budget has not actually been passed before the [April 1] deadline for the last nine years." Sec. 1, p.32, col. 1. The budget was more than two months late in both 1991 and 1994.

During this period, localities pressed for 100% assumption of transitional care funding by the State and for more rapid transfer of clients from educational placements to State facilities where care was completely State-funded. For instance, Suffolk County announced its intention to withdraw from transitional funding in fiscal years 1990 and 1991. *Newsday*, 10/30/90, p. 53. Paul Vitello, a Newsday reporter, characterized the effort as "a game of chicken: to see who flinches first. The county expects the state to flinch. The county commissioner of social services, Ruth Brandwein said as much last week: 'Hopefully, this will put pressure on the state,' she said, 'to pay 100 percent of the costs.' " *Newsday*, 11/1/89, p. 6. In the end, it was the County that folded.

so as to protect the health and safety of these young adults;" 2.) reduced opportunities for maintaining family and community ties; and 3.) "out-of-state facilities may or may not have the authority or capacity to care for young adults properly." 1994 N.Y. Laws, Ch. 600, Legislative History: Assembly Mem., City Mot. Ex. D at 000012. The statute permitted discontinuation of transitional funding only after "an appropriate, available adult placement or adult services" was offered and, if not accepted, had been upheld as appropriate by an administrative hearing or the period in which to request administrative review had expired. *Id.* § 466-5(a).

B. *Related Litigation*

In 1985, the City filed suit against the New York State office of Mental Retardation and Developmental Disabilities (OMRDD) for its "alleged failure . . . to plan for, develop and provide beds to mentally retarded and/or developmentally disabled persons referred by the [city]. *City of New York v. Webb*, No. 40313/86 (Sup. Ct. N.Y. County).[4] In 1991, *Webb* was settled under a court-ordered stipulation of the parties in which OMRDD undertook to place a minimum of 200 individuals annually from a list of 250 City priority placements, to provide written explanations of any failure to place within twenty-four months of referral, and to place all referrals within thirty months of referral. City Mot., Ex. E.[5]

All plaintiffs in the present action for whom OMRDD is responsible were "priority referrals by the City to be placed under the *Webb* stipulation and who either have not been offered a placement by OMRDD or are challenging their offer of placement through the State's appeal procedure." *NYCEP*

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[4] Subsequently, Commissioner Maul was substituted as the defendant for former Commissioner Webb.

[5] There were originally 108 OMRDD TCF clients and an unknown number of OMH TCF clients. The 108 OMRDD TCF clients had been reduced to about 50 by June 1995. *NYCEP*, No. 102684/95 at 3 (Sup. Ct. N.Y. County 6/13/953.

Appellants' Record on Appeal, 5/17/95 Rosenbaum Affirm. ¶5 at 135.

In May 1994, the city filed a contempt motion against the State for its failure to comply with the *Webb* stipulation and order. On October 1995, Judge Collazo, while declining to hold the State in contempt for reasons of policy, directed OMRDD to reimburse New York City's Child Welfare Administration (CWA) $8,500,000 and New York City Health & Hospitals Corporation (HHC) $572,500 for costs incurred through OMRDD's failure to place priority referrals within thirty months. *N.Y.L.J.* 10/27/95, p. 31, col. 2.

C. *City's Withdrawal from TCF*

Notwithstanding the increase in the State's share of the costs from fifty to sixty percent, and its commitment to full funding by 1999, the City, in October 1994, notified the State that it would stop funding TCF after December 31, 1994. City Mem. at 6. On December 7, 1994, New York City's Human Resources Administration (HRA) wrote care-giving institutions and parents/guardians advising them of the City's withdrawal from the TCF program. The letter told the parents/guardians that: "CWA will assist [OMRDD] in facilitating the transfer of all young adults out of Transitional Funding. . . . Please be assured that New York city looks forward to working with you in planning for a *smooth transition* for your family member." Compl. ¶69 (quoting Kathryn Croft, Exec. Dep. Comm., NYC HRA, 12/7/94 Letter) (emphasis added). Despite this assurance, at the same time, Commissioner Croft also notified the care givers that the City's withdrawal from funding TCF would occur in only three and one-half weeks, as of December 31, 1994. On December 30, 1994, one day prior to the expiration of its initial cut-off date, the City agreed to provide funds for TCF ". . . until June 30, 1995 or until the City's budgetary allocation of $1.116 million ran out, whichever occurred first." City Mem. at 6. The City sent mailgrams to parents/guardians

on December 30, 1994, notifying them of continued funding for a limited period. Croft Mem., dated 5/30/95.

On January 31, 1995, the city and OMRDD entered into a Memorandum of Understanding (MOU) in which the City agreed, as it had promised on December 30, 1994, to allocate up to $1.116 million to permit the program to continue until the sooner of funds exhaustion or June 30, 1995.

D. *State Transition Process*

On or about January 11, 1995, OMRDD wrote the parents/guardians, offering an alternate placement to each OMRDD beneficiary and informing them that the city had agreed to fund TCF for a limited period. It offered, in addition to details about a proposed placement, an opportunity for administrative review of the recommended alternative placement. Am. Compl. ¶ 72-73.

The Office of Mental Health (OMH) entered the placement process, however, only on February 27, 1995, when it sent a letter to parents/guardians informing them that the City would provide continued payments for a limited period. This letter[6] also stated that "the state legislature enacted a law (Chapter 600, Laws of 1994) which requires the Transitional Funding Program be phased-out entirely."[7] Pltf. Ex. 7G.

The OMH letter outlined a four step process for placement in OMH operated or licensed programs:

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[6] Pltf. Ex. 7G, OMH Ltr. dated 2/27/95, Ethel Davis Jackson, Assoc. Comm. For Adult Services to Harriet Eaton. Inexplicably, the letter states that OMH was notified that the City would withdraw its funding on December 14, 1994, nearly two months after the City informed the State of its intended withdrawal and a week after care givers and parents/guardians had been notified by the City. OMH does not appear to have notified either parents or care givers prior to this date of the resumption of funding for a limited period.

[7] It should be noted that this is a substantial overstatement of the impact of the TCF Statute; it phased out only *new* TCF placements in 1996 and provided for full phase out (subject to State emergency override) only in 1999.

1. OMH staff of its case management agency would interview and evaluate each individual prior to identification of an appropriate residential program.

2. The client and client advocate were to visit the proposed program, with refusal to visit constituting rejection of placement.

3. Following the visit(s), OMH was to send a "Placement Determination Letter" specifying the placement determined to be appropriate, including a description of the program, services, program contact, and proposed transfer date. This letter was to trigger administrative review procedures.

4. Upon expiration of thirty days without a request for an administrative review or upon affirmation of the placement as the result of administrative review, TCF funding was to end upon the transfer date.

The letter concluded: "Please be assured that the New York State Office of Mental Health is committed to providing *smooth transfers* to appropriate mental health programs." Am. Compl. ¶ 75-77 (emphasis added).

In conformance with their announced procedures, the City and State arranged transition for many OMRDD TCF clients prior to the cessation of funding by the City. For approximately fifty-eight of the 108 OMRDD clients this resulted in transfer from TCF to in-state placements prior to June 1, 1995.[8] It is not clear how many, if any, of the unknown number of OMH TCF clients have been transferred. The Amended Complaint alleges that: "[from February 27 through May 31, 1995] OMH showed proposed facilities but did not proceed to nomination or hearing." Am Compl. ¶ 78 (c).

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[8] *NYCEP*, No. 102684/95 at 3 (Sup. Ct. N.Y. County 6/13/95).

E. *City's Termination of Funding on June 1, 1995*

On May 30, 1995, New York City notified the TCF parents/guardians that the TCF funding would cease, effective two days later, on June 1, 1995. Pltf. Mot. Ex. 5. Judge Freedman's order denying plaintiffs' request for a preliminary injunction was issued on June 13, 1995. The Appellate Division, First Department, declined to consider an expedited appeal on June 30, 1995.

F. *Plaintiffs' State Court Challenge to the City's and State's Right to Discontinue TCF under State Law*

Plaintiffs in the present proceeding filed an action in state court in early 1995, apparently originally as an Article 78 appeal from adverse results in the administrative hearings held by OMRDD following its placement proposals. *NYCEP*, No. 102684/95 (Sup. Ct. N.Y. County 6/13/95). At the end of February, these litigants requested a declaratory judgment that, under the TCF statute, the City and State could not withdraw from funding TCF.[9] This arm of the litigation was decided against the plaintiffs by Justice Helen Freedman on June 13, 1995. *Id.* In October, her decision was affirmed by the Appellate Division, First Department, 1995 WL 552885.

G. *The State's Notices to Plaintiffs Following Announcement of the City's Planned Cessation of TCF Funding*

The City and State provided what can be fairly described as abrupt and ambiguous notifications to parents/guardians concerning the city's planned cessation of funding. At the end of

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[9] In view of subsequent events, the State's initial response to the *NYCEP* suit was, to put a favorable spin on it, ironic. It included the assertions that "a declaratory judgment concerning a potential funding gap should not be permitted because it is (a) premature and thus not a justiciable controversy . . ." and "because OMRDD is presently seeking to place the individuals, including petitioners, now receiving that funding in appropriate in-state facilities prior to [June 30, 1995], the 'potential funding gap' may never occur. State Mem. of Law at 2, 6.

1994, the City's letter announcing the end of TCF funding was provided on short notice[10] and was followed by an eleventh hour notice that funds were in fact still available. The period for which the City extended funding was defined in an indeterminate manner—the exhaustion of a sum of money or June 30, 1995, whichever was earlier. It thus provided little warning that funds would actually run out on May 31. This history of the City-State dispute over funding, followed by temporary resolutions, seems to have lulled not only care givers and parents, but also OMRDD and OMH, into the belief that the City's intention to end TCF funding was an idle threat, comparable to budget delays from 1982-1993.

As noted, OMH's first notification to parents/guardians of transition plans occurred four months *after* the City informed the State of its intended withdrawal from TCF. OMH, moreover, provided parents/guardians with a misleading description of the TCF statute.[11] Pltf. Mot. Ex. 7G. OMH then proceeded very slowly to identify potential placements and indicated that its consultants, not plaintiffs, were to arrange visits. The testimony of the parents/guardians described OMH's total failure to even nominate any alternate, available placement for their children prior to the cessation of funding. Tr. at 159-60, 134, 185-88.

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[10] For instance, the first notice to care givers and parents of the original date of City fund cutoff, December 31, 1994, although announced to the State on October 25, 1994, was given by the City on December 7, 1994. As previously noted, on December 30, 1994, the City sent a mailgram to notify care givers and parents that a temporary extension had been arranged.

On January 11, 1995, OMRDD sent letters offering alternate placements and describing the process to be followed. OMH first corresponded with its clients on February 27, 1995, more than four months after the City's announcement of its intent to withdraw.

With respect to the actual end of City funding, the first notice appears to have been the City's May 30, 1995 notice that funding expired the next day, on May 31, 1995.

[11] *See* note 7.

A final communication subsequent to the cessation of City funding was a June 27, 1995 letter from Governor Pataki to a TCF recipient's parents. It is indicative of the conflicting messages that were sent to parents/guardians by State officials. The letter stated:

> The primary goal of the legislation is to provide appropriate services to children and young adults in New York State rather than in out-of-state placements. To this end, individuals who have aged out, of will soon age out, of their child care or educational placements are to be offered appropriate placements, assimilating into the adult care system operated by the Office of Mental Retardation and Developmental Disabilities (OMRDD) in New York State.
>
> My staff has conferred with Commissioner Maul on this issue, and I am confident that OMRDD is sensitive to each individual's circumstances and needs. Individuals and their families may also benefit from the due process hearing procedures which provide a more formal opportunity to express their concerns over the proposed placements.

Pltf. Mot. EX. 2, Ltr. dated 6/27/95 Pataki to Resnicks. Despite the Governor's statement, which presumably was based on information provided to him by OMRDD Commissioner Maul or his staff, that "due process hearings" would be provided, only two weeks later OMRDD notified TCF parents/guardians that it had eliminated these due process hearings. Pltf. Mot. Ex. 4, Ltr. dated 7/13/95 OMRDD Assoc. Comm. Walsh to Brooks.

H. *Events Subsequent to City's Cessation of TCF Funding*

Following Judge Freedman's determination that the City was entitled to withdraw from funding its portion of the TCF program (and the refusal of the Appellate Division to hear the

appeal on an expedited basis),[12] the State took precipitate action. The State attempted to transfer some of these deeply disabled individuals from long-standing State-approved out-of-state placements over a holiday weekend without permission from or even effective notification to their parents/guardians. Although OMH had previously written to these parents/guardians that transfers would be preceded by a visit to the facility by the client and by the parents/guardians, and that an administrative review process would be available, this procedure was not observed.

On Friday, June 30, 1995, OMH staff told one facility that buses could arrive on Monday, July 3, to take some of the plaintiffs to facilities in New York. Tr. at 120-30, 141-43, 152-57, 166, 171-76, 178-82, 189-90. Only prompt intervention by the facility staff and concerned parents/guardians prevented the buses from carrying plaintiffs away from a facility which had been their home for years to an unknown facility over the holiday weekend. This intervention obtained, first, a delay from Monday, July 3, to Friday, July 7, and, finally, cancellation of the planned move.[13]

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[12] *NYCEP*, No. 102684/95 (SUP. Ct. 6/13/95), *aff'd*, 1995 WL 592885 (App. Div. 1st Dep't 1995).

[13] Proposed intervenors in this suit submitted an affidavit from Joseph Assalone, a staff member at the Judge Rotenberg Educational Center (JRC), describing another OMH "raid" over the July 4th weekend, involving a notice from OMH to a disabled student—but not the student's parent—received on July 7, 1995, informing him that he would be transported to the Elmira Psychiatric Center on July 7, 1995. Assalone contacted the student's father who stated that he had not given OMH his consent and did not wish his son to leave.

Assalone then contacted Lewis Campbell of OMH to inform him that he did not have parental consent for the student's release. "Mr. Cambell (sic) told me that the funding ended on June 30, and [the student's father] would be responsible to pay if [student] remained at JRC. Mr. Campbell told me that people were on their way to JRC but he would contact them and tell them not to come. . . . At approximately 8:15 am on July 7, two representatives from the Elmira Psychiatric Center came to JRC in a police car. . . . They . . . gave me a letter from Bert Pyle, Jr. from Elmira. The letter directed us to release [student]. Assalone Aff.

Later in July, several parents/guardians visited a proposed transfer site in Utica, approximately four and one-half hours from New York City. Tr. at 130. One was told that placement there would be temporary only and that a permanent placement had not been determined. Tr. at 132, 164. The staff at the proposed transfer sites, although described by a parent as "pleasant," demonstrated ignorance about the nature of the plaintiffs' disabilities. Tr. at 131-32. For example, a parent brought to the attention of the OMH staff at the site that his daughter's disability was not primarily psychiatric. Upon review, the State apparently agreed and, in August 1995, State responsibility for this plaintiff was transferred from OMH to OMRDD. Tr. at 161-62. Another parent reported that the staff member designated as her contact "had no awareness that [plaintiff] had a language problem." Tr. at 132.

As part of the events of the Fourth of July weekend, the State gave plaintiffs notice that no further funding would be provided for the current placements and that "the cost of remaining in your current placement would become the responsibility of you and your family." Ethel Davis Jackson, OMH Assoc. Comm. for Adult Community Services Ltr. dated 6/30/95 to Harriet Eaton, Pltf. Mot. Ex. 3. In July and August, the State also notified parents/guardians that it was eliminating the administrative appeal process formerly provided. Pltf. Mot. Ex. 4, James M Walsh, Assoc. Comm., OMRDD Ltr. dated 7/13/95. Lewis D. Campbell, OMH Dir. Bureau of Special Projects, Ltr. dated 8/1/95, Am. Complt. ¶ 93-94. Informal discussions with the Office s staff were offered as a replacement.

Moreover, as of November 1995, efforts have broken down to arrive at an interim settlement (announced in September 1995) in which the State would at least have paid care-providers the sixty percent share that it would otherwise have paid as reimbursement to the City had the City not withdrawn.

Discussion

(1)

Plaintiffs' Out-of-State Placements Result from State Action

These plaintiffs, like those in the Suffolk Developmental Center addressed by the Court of Appeals for the Second Circuit in *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1246 (1984), "are entitled to safe conditions and freedom from undue bodily restraint." The plaintiffs are not in State-operated institutions; and the State asserts that it has no custody of them and no entitlement is involved here. Yet, the State has been intimately involved in their institutionalization from the time it gave its approval when plaintiffs were children and has provided subsidies for their original placements in out-of-state residential care ever since. In many instances, the State is de facto, if not de jure, guardian of the plaintiffs.[14] Institutionalization of the plaintiffs qualifies as state action for § 1983 purposes under the 'close nexus test' where the State " 'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government].' " *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 546 (1987) (quoting *Blum v. Yaretsky*, 457 U.S. 991 (1982)).

It was the State's failure to promptly place adults (or to return them home—assuming there was no entitlement to care and that such an alternatives was even feasible) as they aged out of child placements that gave rise to the TCF pro-

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[14] Plaintiffs are all adults, some of whom are represented in this action by their parents, but at least one of whom is "represented" by a relative who did not have legal authority even when the plaintiff was a minor. This witness manages the affairs of her "half first cousin" but has no court order. Tr. at 171, 182.

gram.[15] In a collateral matter in state court, Justice Salvador Collazo has held the State liable for nearly $9 million for its failure to fulfill its commitment to place 200 mentally retarded City citizens per year in long term residential care. *City of N.Y. v. Maul*, *N.Y.L.J.* 10/27/95, p. 31, col. 2 (Sup. Ct. N.Y. County).[16] Plaintiffs are among those City citizens that the State has failed to place. *NYCEP* Appellants' Record on Appeal, Rosenbaum Affirm., dated 5/17/95 ¶ 5 at 135.

The complexity and variations of the funding relationships over the period between 1982-1995 should not be permitted to obscure the primacy of the State's role in the out-of-state residential placement of severely retarded and mentally ill adults. During the entire period, the State, not the City, has had the responsibility for approving out-of-state placements and monitoring out-of-state facilities. For instance, Ms. Friedman, co-counsel for plaintiffs, stated, without objection from the State or City, that the out-of-state placements were arranged only after parents took their "papers from the Board of Ed. . . . to send them to the regional director in the State Education Department for approving before funding would ever start." Tr. at 45. Further, such placements could be considered only after "there were five in-state rejections for a residential school." *Id.* Ms. Friedman continued "[T]he state education system didn't have anything, the local education system didn't have anything, and once they aged out there was no place for these people to go after twenty-one in-state." *Id.* at 46.

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15 The memo from Susan Demers, General Counsel & Deputy Commissioner of the Department of Social Services, to Elizabeth D. Moore, Counsel to the Governor, dated 7/21/94, concerning the TCF bill, acknowledges the primacy of the State role: "[The bill] would result in the costs of care for persons in transitional care being paid through the State rather than continuing to be a charge on the social services districts. *Such a transfer is equitable because social services districts have no legal authority over these adults.*" N.Y.C. Mot Ex. D at 000031-32 (emphasis added).

16 Maul replaced Webb as Commissioner of OMRDD.

The TCF program was developed as a stopgap measure to bridge the State's persistent inability to find appropriate instate placements and timely place persons in the adult care system who had been placed in out-of-state residential programs as children. In her memorandum to the Governor's Counsel, Elizabeth Moore, dated 7/21/94, City Mot. Ex. D at 000028, recommending approval of the TCF statute, Susan V. Demers, Deputy Commissioner and General Counsel, Department of Social Services, wrote: "Transitional care originally developed to deal with the problems of persons in residential schools and residential child care facilities who reached the age of 21, who needed placements in OMH of OMRDD adult care facilities but for whom no such placements were available." *Id.* at 4/000031. Consequently, the State had a determinative role in placing these individuals in the out-of-state facilities and, through its responsibility for locating appropriate in-state placements for them, had a determinative role in their remaining in out-of-state placement when TCF funding terminated.

(2)

Due Process

A. *Constitution Requires Exercise of Professional Judgment*

In *Youngberg v. Romeo*, 457 U.S. 307 (1982), the Supreme Court stated that, to determine the minimum constitutional standard applicable to persons confined (for non-penal reasons) in an institution as the result of state action requires ascertaining whether "professional judgment in fact was exercised." *Id.* at 321. This does not mean, contrary to plaintiffs' assertion, that transfer may be justified *only* where "independent medical judgment indicates the necessity of a transfer." Am. Compl. ¶ 57. *Youngberg* establishes the constitutional standard with which the State must comply—provision of necessary safe conditions and freedom from undue

restraint determined by the exercise of professional judgment. *Id.* at 319. This standard was further elaborated by the Court of Appeals for the Second Circuit in *Good Will*, 737 F.2d at 1250:

> [D]eprivation [of mentally retarded residents' liberty interest in a humane and decent existence] exists when institution officials fail to exercise professional judgment in devising programs that seek to allow patients to live as humanely and decently as when they entered the school, i.e., when there is no individually oriented, professionally devised program to help . . . residents maintain the fundamental self-care skills with which they entered the Center.

In *Youngberg*, the Supreme Court acknowledged that: "[A] State necessarily has considerable discretion in determining the nature and scope of its responsibilities." 457 U.S. at 317. However, here, the State has not decided, for reasons of "economy, efficiency and expedition," *O'Bannon v. Town Court Nursing Center*, 774 U.S. 773, 800 (1980), to cease providing residential placement for severely disabled adults. That legislative decision would be comparable to the District of Columbia's elimination of free homeless shelters for men in *Williams v. Barry*, 708 F.2d 789 (D.C. Cir. 1983), for which a "particularized notice detailing the reasons for the proposed closing and a reasonable opportunity to prepare and submit written responses to the Proposal," *id.* at 790-91, was held to provide "the homeless men all the process they are due."[17] *Id.* at 792. Here, however, despite the formalistic abjuration of responsibility in the TCF Statute,[18] in fact, the State accepts

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[17] It may be noted that the District of Columbia proposed to terminate its homeless shelter service in May, not in January. Had the proposed closure threatened the shelter's residents with extreme weather, it is possible that, in view of the more serious harm thus threatened, due process would have required a transition designed to minimize physical harm to the persons affected.

[18] 1994 N.Y. Laws Ch. 600 § 16.

the necessity for residential placement for these plaintiffs and, had it fulfilled its obligation to locate appropriate in-state placements in a timely manner, it would have accepted financial responsibility for them.[19] Consequently, just as the state actors in *Goodwill* had a constitutional obligation to provide their residents a humane and decent existence, so, too, in this action the State is obligated to exercise professional judgment to find, and professionally plan transition to, suitable facilities for the individuals still in out-of-state placements.

B. *Absence of Professional Judgment in Transition Arrangement*

The procedure followed by the State was manifestly unprofessional. The actions of State officials on the weekend of July 4, 1995 did not approach the minimal standard necessary to assure appropriate safe conditions for the plaintiffs. State action would have uprooted some plaintiffs to temporary placements in New York where their disabilities were poorly understood with no indication of where their ultimate placements would be or how long they would be in these "temporary" locations. State action now leaves them in limbo without funding for their present placement and without any process for an orderly transition, let alone the "smooth transition" repeatedly promised by State and City officials.

Moreover, the "process" pursued in early July by OMH was at variance with the process it previously announced that it would follow; the "process" was also at variance with the procedures provided in state legislation.[20] The transfer procedure

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[19] The State's long term intent and commitment with regard to plaintiffs here also distinguishes these circumstances from those in *Williams v. Barry*. There, "the statements and declarations of policy on which the court relied in making this determination [of entitlement] often were qualified and couched in the language of short-term measures." 708 F.2d at 792. Here, the State does not dispute its long-term obligations to these individuals.

[20] *See supra*, p. 6. Although, pursuant to *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), this court has no jurisdiction

of the Fourth of July weekend—if it can be called a procedure—was an unconstitutional violation of the rights of these individuals that threatened them with irreparable harm. The abrupt cessation of funding for placements without an orderly transition, in violation of the announced procedures of both OMH and OMRDD, continues to threaten plaintiffs with irreparable harm.

The Second Circuit in *Good Will*, 737 F.2d at 1246, following the Supreme Court in *Youngberg*, held that once the State made such individuals "dependent on the state, it was required to [house those voluntary residents] in a manner that would not deprive them of constitutional rights." As I read Judge Meskill's endorsement here of Justice Blackmun's concurrence in *Youngberg*, due process, at a minimum, requires a "do no harm" standard. There is evidence that, if State officials here had succeeded in their plans, the plaintiffs' physical safety as well as the maintenance of their fundamental functional capabilities might well have been endangered. *See* Pltf. Mot. Ex. 7, Septimus & Bavaro Aff.

The actions of the State here with respect to transition might fairly be analogized to a decision of a state or Congress to end support for a dialysis program. Such a program is not an entitlement; there is no custody of the patient for state action purposes; and the program's elimination is within the discretion of a State or Congress. Still, no one would seriously argue that the Due Process Clause does not impose an obligation upon a State or Congress to provide reasonable notice to dialysis recipients before terminating funding for those who have relied on that life-sustaining program so as to allow them the opportunity to obtain alternate access to treatment. Where, as here, the recipients are not only dependent upon the State, but the State also has made assurances that the transition would be "smooth," it must be estopped from peremptorily removing funding—even if there is no entitle-

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to hear claims against the State *based on state law*, state law may define the process that is due. *Paul v. Davis*, 424 U.S. 693 (1976). *See also Board of Regents v. Roth*, 408 U.S. 564 (1972).

ment—without at least following the process it led plaintiffs to expect.

The State's refusal to fund out-of-state placements, in view of its failure to complete placement of all TCF recipients, suggests a perverse game of musical chairs where not one but many persons are left standing when the music stops. The precipitate termination of support for out-of-state placements prior to the State's conclusion of arrangements for suitable placements within the State has left these plaintiffs stranded without financial support and without the means to effectuate an orderly transition to appropriate in-state care.

As Justice Blackmun noted in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) (quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980)):

> Each of our due process cases has recognized, either explicitly or implicitly, that because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action."

Thus, the fact that state law provisions governing funding of out-of-state placement permit the City to terminate funding does not in turn authorize the State to violate its Constitutional duties to these most vulnerable of citizens.

C. *State Breached its Due Process Obligations*

Having decided that New York State had a due process obligation to the plaintiffs, it may be found to have breached that duty by the following acts:

1. OMH's almost complete failure to plan any orderly transition for its TCF clients after the City announced its intention to terminate funding in October 1994 and even after the Memorandum of Understanding between the City and the State that moved the date of funding termination to July 1, 1995 (subsequently

accelerated to June 1, 1995 because of exhaustion of the City's TCF budget);

2. OMH's precipitate actions attempting to transfer plaintiffs over the July 4, 1995 weekend to placements that were not based on minimal professional judgment[21] (the events of the Fourth of July weekend demonstrated an approach in which transfer came first, professional judgment, second); and

3. OMRDD's failure to complete the hearing process that it had announced to the plaintiffs and their parents/guardians. Pltf. Mot. Ex. 4, dated 7/13/95 OMRDD Ltr. Assoc. Comm. Walsh to Brooks.

D. *Due Process Requires Maintaining Present Placement until Review of Proposed Placement Completed*

Having established the probability of a finding that the State breached its constitutional duty with respect to the liberty interests of these plaintiffs, the question becomes, what process is due? In *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 797 (1980), Justice Blackmun, writing for the majority, stated:

> Procedural due process seeks to ensure the accurate determination of decisional facts, and informed unbiased exercises of official discretion. To the extent procedural safeguards achieve these ends, they reduce the likelihood that persons will forfeit important interests without sufficient justification.

Here, accurate determination of appropriate placement requires careful review of the plaintiffs' requirements and suitability of proposed placements. Failure to provide such

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[21] For example, Mr. Niemi testified concerning OMH's lack of understanding that his daughter's problems were not psychiatric. His testimony was substantiated by the State's subsequent transfer of responsibility for her care from OMH to OMRDD. Tr. at 158-63 and Pltf. Ex. 15 OMH Ltr. 8/31/95 attaching 8/15/95 OMRDD Ltr.

review can lead to the forfeiture of the plaintiffs' interests in humane confinement.

"A procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case." *Bell v. Burson*, 402 U.S. 535 (1971). TCF provided for the maintenance of the individual in existing placement until the State agency responsible nominated an appropriate and available adult care facility to the person and the person's parents/guardians and, subject to strict time limits, provided a formal administrative review process. Pursuant to the binding effect of the state court judgment in *NYCEP* and the Supreme Court's decision in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984) (holding that the Eleventh Amendment prohibited consideration by a federal court of state law claims against the state under pendent jurisdiction), the TCF statute is not directly applicable here. Nonetheless, state law may assist in defining the process that is required.[22] The TCF statutory provisions certainly formed the basis for many State communications with the parents/guardians and led to their expectations that the State would adhere to the procedures it had announced.[23] The TCF statute laid out basic procedural guarantees that were certainly not provided to the OMH plaintiffs and have only partially been provided to the OMRDD plaintiffs.

Because the State owes plaintiffs due process in effectuating the transition, maintenance of the plaintiffs in their present placement until this process has been completed is essential. State respect for plaintiffs' liberty interests will be a sham if the State does not support plaintiffs' present placement while due process review of proposed placements is provided for each individual needing placement. Further, in view of the plaintiffs' allegations that the administrative proceedings were not independent of the agencies, an opportunity

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22 *See* note 20.

23 *See supra*, p. 5.

for judicial as well as administrative review may also be required.

(3)

Equal Protection

Although the procedural Due Process violations are in themselves sufficient to satisfy the standards for issuance of a preliminary injunction,[24] plaintiffs also raise a significant equal protection issue that should be addressed in subsequent proceedings considering the issuance of a permanent injunction. The State violates guarantees of equal protection when it converts "certain similarly situated claims into dissimilarly situated ones, and then uses this distinction as the basis for its classification. This . . . is the very essence of arbitrary state action." *Logan*, 455 U.S. at 442 (State agency violated state law by setting the hearing for an employment discrimination claim outside the 120 day conciliation period following the allegedly discriminatory act. The Supreme Court held that the Illinois Supreme Court violated the claimant's equal protection rights when it held that the agency's failure extinguished the claimant's right of action.)

Here the inability of the State to provide treatment in-state resulted in State-approved out-of-state placement for these plaintiffs. The harm suffered by the plaintiffs was the result of earlier state action which failed to provide appropriate placements in-state and then left them stranded in out-of-state placements when the City and then the State discontinued TCF funding. Because of the State's inability to accommodate the plaintiffs in-state, when originally placed and now, and its approval and financing of their out-of-state placements, the State may well be denying plaintiffs equal treatment with respect to others similarly situated but transferred in-state prior to the termination of funding. As in *Logan*, 445 U.S. at

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[24] *See infra*, (4).

442, the State has converted "similarly situated claims into dissimilarly situated ones" and then treated them differently.

Furthermore, the State's insistence on bringing plaintiffs, whose out-of-state placement resulted from state action, to in-state facilities may threaten them with treatment that fails to meet the constitutional standard enunciated in *Good Will*. Such insistence will in fact harm them and will deprive them of hard-won gains achieved in present placements. This also deprives them of the protection the State makes available to persons with similar disabilities placed in-state because of an arbitrary distinction created by the State.

(4)

Qualification for a Preliminary Injunction

"The purpose of a preliminary injunction is to preserve the status quo pending the final determination of a dispute." *Arthur Guinness & Sons, PLC v. Sterling Publishing Co., Inc.*, 732 F.2d 253, 256 (2d Cir. 1984); *see, e.g., JSG Trading Corp. v. Tray-Wrap Inc.*, 917 F.2d 75 (2d Cir. 1990). Plaintiffs have met the well-settled standard for a preliminary injunction:

> The standard in the Second Circuit for injunctive relief clearly calls for a showing of (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigating and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979).

A. *Constitutionality of the State's Actions is Seriously Questioned*

The absence of professional judgment in the State's "transfer procedure" and the refusal to establish a payment procedure for care-providers following Justice Freedman's decision demonstrates the existence of "sufficiently serious questions going to the merits" of the alleged constitutional violation to satisfy the first part of the second prong of the standard. This makes a fair ground for litigation with a real possibility for success on the merits. *Medical Society v. Toia*, 560 F.2d 535, 538 (2d Cir. 1977). The balance of hardship certainly tips toward plaintiffs, whose very functioning is threatened, as opposed to the possible incurrence of some incremental some by the State for out-of-state care rather than in-state care.

B. *Prospect of Irreparable Harm Is Actual and Imminent*

The appearance by a representative for Woods School has brought to the Court's attention the critical problem faced by the private organizations currently caring for the plaintiffs. Woods School has not been paid since City funding was discontinued in June. Over $200,000 in expenses for plaintiffs have accrued at Woods School in the July through September 1995 period alone.[25] Woods School and the other institutions are now confronted with conflict between their ability to care for these individuals and their duty to protect the financial health of their institutions which directly impacts upon their ability to serve others.

Moreover, the prospect of irreparable harm is " 'not remote or speculative but . . . actual and imminent.' " *Jackson Dairy, Inc.* at 72 (quoting *New York v. Nuclear Regulatory Comm.*, 583 F.2d 605, 610 (2d Cir. 1978)). The harm that will be caused to these severely disabled persons by a hasty transfer as the institutions discharge plaintiffs, which they forced

[25] A tentative interim settlement proposed in September under which the State would have paid its 60% share toward the cost of care, using the City as a conduit, has collapsed.

to do because of cessation of funding, certainly cannot be repaired by money damages. The balance of hardships tips unquestionably in the direction of the plaintiffs.

Plaintiffs have made a substantial showing that the State has not offered, and may not soon be able to offer, placements appropriate for many, if not all, of these most severely impaired individuals. In this connection, it is important to note that neither the State nor the City has rebutted the affidavits and testimony offered by plaintiffs describing repeated rejection of plaintiffs by in-state providers recommended by the State.

The State of New York, having assumed responsibility for the care and maintenance of these seriously impaired individuals, is the entity ultimately responsible under the federal constitution for the accomplishment (or failure) of any transition to adult placements in a manner that satisfies due process standards.[26] As Judge Brieant held in earlier litigation concerned with severely disabled children:

> A disruption of [these] lives, such as that which would be caused by an abrupt change of [facilities], would be likely so to disturb these [individuals] that many skills, acquired after time and great effort, would become unlearned and lost. Many have been transferred before;

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[26] The City's role with respect to plaintiffs has been primarily that of fund provider since they entered adult care. *See*, note 15, Demers Mem. ("Such a transfer [of financial responsibility to the State under the TCF statute] is equitable because social services districts have no legal authority over these adults.")

The State litigation has determined that the City was entitled to terminate its participation in the TCF program. *NYCEP*, No. 102684/95 (Sup. Ct. N.Y. County 6/13/95), *aff'd*, 1995 WL 592885 (App. Div. 1st Dep't 1995). Having failed to raise plaintiffs' constitutional claims regarding the cessation of funding in that litigation which proceeded to a final resolution in New York state courts, pending appeal, plaintiffs are foreclosed from raising them here. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 85 (1984) ("Section 1983 . . . does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims.").

> shuttled from pillar to post . . . At least during the pendency of this lawsuit, such irreparable injury . . . must be avoided.

Stanger v. Ambach, 501 F. Supp. 1237, 1243 (S.D.N.Y. 1980).

This concern was echoed in the legislative history for the TCF statute: "the potential for serious disruptions in care for these young adults, who have less tolerance for disruption than most others in our systems of care, remains higher than is warranted." Memorandum of State Executive Department, attached to *NYCEP* Appellants' Record on Appeal, Ex. G.

Therefore, as the circumstances fully satisfy the requirements, a preliminary injunction may be granted.

(5)

Res Judicata Is Not Applicable

The issues and transactions on which this order are based are not the subject of pending or completed state proceedings. *See O'Brien v. City of Syracuse*, 54 N.Y.2d 353 (1981) (litigation based on acts occurring after the original lawsuit is not barred by res judicata). Federal law looks to the applicable state res judicata principles. *Kremer v. Chemical Construction Corp.*, 465 U.S. 461 (1982). The claim is based on constitutional violations occurring after the resolution of *NYCEP* in state court.[27] Final resolution of the funding issue in state

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[27] The findings in this opinion are based on the pleadings and on a hearing at which only the plaintiffs presented evidence. Continuation of the hearing was put off based on representations by the City and State defendants that a tentative settlement had been arranged with the plaintiffs. No good explanation has been provided the court for the failure of the settlement effort, particularly, as noted above, in view of the State's existing appropriation for 60% of the costs of the placements plus a portion of the City's costs of administration. TCF Statute, 1994 N.Y. Laws, Ch.600 § 466; Soc. Serv. L. Art. 8-B. At this point, nearly six months after elimination of TCF funding and the proposal of improper transfers, with the plaintiffs facing imminent discharge from current placements

court (now affirmed by the Appellate Division for the First Department, but still possibly subject to review by the New York Court of Appeals) did not authorize the State to subject plaintiffs to unconstitutional treatment by depriving them of their interest in humane institutionalization without procedural due process.

Furthermore, abstention is not appropriate here because the claim does not involve the interpretation of a novel state statute. "Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).

(6)

Concluding Thoughts

This dispute is disheartening. No party seriously questions the necessity of public care for these plaintiffs nor that ultimately care for these plaintiffs will be funded by the State. The money to pay for at least sixty percent of the cost is already in the state budget. The only question is whether the State will pay present out-of-state facilities or only in-state providers. There has been no showing that the State would save any, let alone substantial, money during this transitional phase through its insistence on an abrupt, unseemly, and unprofessional transfer. With respect to the City, in view of Justice Collazo's decision in *Maul*, it appears now that the City is entitled to full reimbursement by the State for costs for plaintiffs' TCF care. Whatever the equities of City's position that the State has failed to meet its commitments, the City's failure, in light of Justice Collazo's decision, to reconsider its refusal to participate in TCF is, at a minimum, difficult to understand. Indeed, whatever the merits of their

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that can no longer afford to provide care gratis, and with no explanation for the failure of the settlement, the State is not free to insist on a right to complete the presentation of its side before any action is taken by the court.

respective positions in this short-term funding dispute, the actions of both the City and State throughout constitute a shameful, if not cruel "game of [budgetary] chicken" at the expense of those who, by any test, are least able to fend for themselves. The City's and State's actions will certainly disrupt, if not put at risk, the lives of these seriously disabled persons. Responsible public officials can and should do better.

Conclusion

Plaintiffs' motion for a preliminary injunction is granted in part. The State of New York is hereby ordered to take all necessary steps, including but not limited to payment of out-of-state facilities at which plaintiffs currently reside, to maintain plaintiffs in their present placement until, following evaluation procedures evincing the exercise of professional judgment, in compliance with the standards enunciated in *Youngberg* and *Good Will*, orderly transition to permanent State approved placement is accomplished. Orderly transition is to include the proposal of, and opportunity to visit, appropriate, available, long-term placements plus an opportunity for the plaintiffs and their parents/guardians to obtain independent administrative and/of judicial review.

In light of the representations made by the City and the State to this Court, the motion to intervene will be held in abeyance for the present.[28]

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[28] Both the State and the City represented that they generally treat litigants and non-litigants alike upon receipt of a judgment. "Generally the City . . . applies court decisions across the board to a group of people even if it isn't a class action." Tr. at 2, Rosenbaum. ". . . the state would treat everybody the same. We have done so with regard to the State litigation which is not a class action and even though Judge Freedman's decision in State Supreme Court was only binding on a few people, we applied [it] across the board to everyone." Tr. at 3, Adler.

Dated: Brooklyn, New York
November 16, 1995

So ORDERED:

/s/ DAVID G. TRAGER
David G. Trager
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed August 7, 1996

Docket No. 95-9178

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 7th day of August, one thousand nine hundred and ninety-six.

Brooks,

Plaintiffs-Appellees

—v.—

Pataki,

Defendants-appellants

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the Plaintiffs-appellees.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: KATHLEEN BROUWER
Kathleen Brouwer
Operations Manager

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 95-9178

Filed: August 14, 1996

BROOKS, et al.,

Plaintiffs-Appellees

—v.—

PATAKI, et al.,

Defendants-Appellants.

NOTICE OF MOTION FOR STAY OF MANDATE UNDER 28 USC § 2101(f) AND FRAP 41(b)

MOTION BY:

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Has consent of opposing counsel:

A. been sought? [x] Yes [ ] No

B. been obtained? [ ] Yes [x] No

Has service been effected? [x] Yes [ ] No

Is oral argument desired? [ ] Yes [x] No
(Substantive motions only)

Requested return date:
(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

A. by scheduling order? [x] Yes [ ] No

B. by firm date of argument notice? [x] Yes [ ] No

C. If Yes, enter date: Decided 31 May 1996

Judge or agency whose order is being appealed:

David G. Trager, USDJ, EDNY

Brief statement of the relief requested:

Stay issuance of mandate pending filing of petition for *Certiorari*.

By: *(Signature of attorney)*

/s/ WILLIAM J. BURKE August 14, 1996
William J. Burke

Appellee or Respondent:

[x] Plaintiff [ ] Defendant

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted.

[ILLEGIBLE]

DENNIS G. JACOBS (per ILLEGIBLE)

FRED E. PARKER (per ILLEGIBLE)
Circuit Judge

Dated: August 29, 1996